Supreme Court, U.S.
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98 688 OCT 26 1998

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE ATEEQ,
Petitioner,

vs.

ELIA NAJOR, RANGER INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Can a non-Article III bankruptcy judge constitutionally hear and determine a "non-core, related to" proceeding to cancel an appeal bond filed in and subject to the prior jurisdiction of the state court without the express consent of the parties?

PARTIES TO THE PROCEEDING

The petitioner is George Ateeq ("Ateeq"), the beneficiary of an appeal bond filed in the Superior Court of California, County of San Diego and a creditor in the underlying bankruptcy case.

The respondents are Elia Najor ("Najor"), the debtor in the underlying bankruptcy case, and Ranger Insurance Company ("Ranger"), a Delaware corporation and the surety on the appeal bond.

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PETITION FOR WRIT OF CERTIORARI

Petitioner George Ateeq respectfully petitions for a writ of certiorari to review the judgment, and postjudgment motion ruling, of the United States Court of Appeals for the Ninth Circuit.

I. OPINIONS BELOW

The decision of the panel denying rehearing (App. D1) is unreported. The panel decision of the court of appeals on the merits (App. A1) is unreported. The bankruptcy appellate panel's decision is unreported. The decisions of the bankruptcy court (App. B1; C1) are unreported.

II. JURISDICTION

On July 28, 1998, the court of appeals denied Ateeq's timely petition for rehearing. (App. D1.) The judgment sought to be reviewed was entered on July 1, 1998. (App. A1.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent text of the following constitutional provisions and statutes is set forth in Appendix E:

Article III, Section 1 of the United States Constitution;

Fifth Amendment to the United States Constitution;

Tenth Amendment to the United States Constitution;:

28 U.S.C. § 157;

28 U.S.C. § 1334(b);

Rule 7008(a) of the Federal Rules of Bankruptcy Procedure ("FRBP");

FRBP Rule 7012(b).

IV. STATEMENT OF THE CASE

This action challenges the exercise of full adjudicatory jurisdiction over purported "non-core, related to" proceedings by a non-Article III bankruptcy judge when all parties to the proceeding did not expressly consent to such jurisdiction. The Bankruptcy Rules require express consent. *See*, FRBP 7008(a) and 7012(b). The Ninth Circuit has ignored the express consent requirement and ruled that consent to full adjudicatory jurisdiction may be implied. *See, e.g. Mann v. Alexander Dawson (In re Mann)*, 907 F.2d 923, 926 (9th Cir. 1990). This *conflicts* with the Eleventh Circuit which has required express consent. *See, e.g. In re Brickell Inv. Corp.*, 922 F.2d 696, 701-702 (11th Cir. 1991).

The bankruptcy court entered an order canceling an appeal bond on file in a then pending state court action and released the surety from all liability thereunder, despite the bankruptcy court's complete lack of jurisdiction to take such action and the failure of all parties to the motion to *expressly* consent to the exercise of full adjudicatory jurisdiction. There was no bankruptcy purpose to such an order as it did not implicate in any way the restructuring of debtor-creditor

relations or otherwise have an effect on the bankruptcy estate.

Thereafter, Ateeq moved to set aside the bankruptcy court's order as void for lack of jurisdiction under Rule 60(b) of the Federal Rules of Civil Procedure ("FRCP"), which was denied. The bankruptcy court found that it had "core" jurisdiction to cancel the bond, or alternatively had supplemental jurisdiction under 28 U.S.C. § 1367. Moreover, although it did not find "non-core, related to" jurisdiction, the bankruptcy court determined that Ateeq consented to jurisdiction *by failing to expressly object to jurisdiction.*

The Bankruptcy Appellate Panel and the Ninth Circuit affirmed the bankruptcy court. The Ninth Circuit concluded that even though the bankruptcy court failed to determine whether the original motion was core or non-core at the time the motion was heard, as required by 28 U.S.C. § 157(b)(3), and Najor failed to allege whether the matter was core or non-core as required by FRBP 7008(a), Ateeq's failure "to object to the bankruptcy court's jurisdiction in a timely manner 'constitutes implied consent to the resolution of the controversy.'" (App. A4.)

The bankruptcy court's exercise of full adjudicatory jurisdiction over an at best "non-core, related to" matter without the express consent of the parties to the proceeding — contrary to this Court's prior guidance — is an unconstitutional exercise of the "judicial Power of the United States" within the meaning of Article III, Section 1 of the United States Constitution.

A. FACTUAL BACKGROUND

1. Ateeq's State Court Judgment

In 1988, Ateeq filed a complaint for breach of trust,

breach of confidentiality and fraud (the "State Court Action") against Najor in the Superior Court of California, County of San Diego (the "Superior Court"). On February 14, 1991, after a two-week trial by jury, judgment was entered against Najor in the amount of $449,010.51 (the "State Court Judgment"), which included punitive damages. Thereafter, Ateeq recorded an abstract of judgment and obtained the issuance of a writ of execution against Najor in order to enforce his judgment. Ateeq levied on approximately $104,605 in Najor's bank accounts. After Ateeq's enforcement efforts had borne fruit, Najor appealed the State Court Judgment. On April 16, 1991, upon Najor's ex parte application, the Superior Court issued an order staying execution on the State Court Judgment pending the appeal and releasing to Najor the $104,065 levied on by Ateeq. The order was conditioned on Najor's posting of an appeal bond in the amount of $674,000 pursuant to California Code of Civil Procedure ("CCP") § 917.1.

A bond was issued by Ranger for the benefit of Ateeq and filed with the Superior Court pursuant to California law. As collateral for the bond in favor of Ateeq, Ranger received a $300,000 irrevocable letter of credit issued by First Western Bank and a second deed of trust against certain vacant land.[1] Ateeq took no further action to enforce his State Court

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Ranger did not have a valid, perfected interest in the real property. The deed of trust was defective in that the wrong APN numbers were typed on the face of the trust deed and the attached legal description was erroneous. An inadequate description of the property will invalidate a trust deed. *Sepulveda v. Apablasa*, 25 Cal.App. 2d 381, 385 (1938). Moreover, the real property was over-encumbered rendering the purported security interest worthless.

Judgment or perfect his interests in total reliance on the bond filed supporting the stay of execution.

Pursuant to a demand made by Ranger to draw down on the full amount of the letter of credit, in June 1992, First Western Bank transferred $300,000 from the letter of credit to Ranger.

2. Najor's Chapter 11 Case

On July 27, 1992, while the appeal of the State Court Judgment was pending, Najor filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court, Southern District of California.

The bankruptcy schedules originally filed by Najor did not list Ateeq, Ranger or First Western Bank as creditors. Nor were the bond, letter of credit or deed of trust listed as assets of the bankruptcy estate.[2] (Nor was there any evidence presented that the letter of credit was secured by any property belonging to Najor.)

3. Najor's Motion for Turnover of Collateral and Cancellation of Bond

During the Chapter 11 case, Najor filed a notice of motion and motion for turnover of the alleged collateral supporting the bond (the "Notice") pursuant to 11 U.S.C.

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The bond was not property of the estate. *Matter of Lockard*, 884 F.2d 1171, 1178 (9th Cir. 1989). The proceeds of the letter of credit were *not* property of the estate under bankruptcy law, but were property of First Western Bank. *In re Duplitronics, Inc.*, 183 B.R. 1010, 1015 (Bankr. N.D. Ill. 1995).

§542.[3] Although the bond was subject to the prior jurisdiction of the Superior Court and could not be canceled under California law, included in this Notice was a request for cancellation of the bond issued by Ranger.[4] As grounds for cancellation, Najor asserted that the bond was no longer necessary. There was *no mention* in the Notice of the *release of liability* of Ranger. Nor did Najor state that under well established case law, the letter of credit and its proceeds were not property of the estate and would not be subject to turnover.

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A debtor seeking turnover of property must generally bring that action in the form of an adversary proceeding. *In re Wheeler Technology, Inc.*, 139 B.R. 235, 239 (9th Cir. BAP 1992); FRBP 7001. By requiring an adversary proceeding, the defendant in such an action would be apprised of the jurisdiction of the bankruptcy court to enter a final order, and other procedural safeguards would be highlighted, pursuant to FRBP 7008(a) and 7012(b).

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In order to properly obtain jurisdiction over the bond filed in the Superior Court, Najor should have attempted to remove the State Court Action to the bankruptcy court. No removal was ever undertaken. Had the action been removed, it was subject to the abstention provisions of 28 U.S.C. §1334(c). If Congress had wanted bankruptcy courts to automatically hear and decide issues in litigation pending in other forums, it would not have created the procedures for removal and abstention, or Congress would have specifically conferred such jurisdiction, such as in 11 U.S.C. § 543. *See, In re Sundance Corp., Inc.*, 149 B.R. 641, 650 (Bankr. E.D. Wash. 1993). (Through § 543, "Congress has apparently authorized bankruptcy courts to review and conclude matters relating to a state court receivership. . . . Although the duty to review a receiver's performance might have best been delegated to the appointing court, Congress chose to confer those powers on the bankruptcy courts.")

Najor's Notice completely ignored the rights Ateeq had in the bond, the protection of those interests under California law and the specific reservation of those rights to the states under the Tenth Amendment to the United States Constitution.[5]

Najor's complete argument regarding the cancellation of the bond was that as "*incidental* to the release of the collateral" supporting the bond, the bankruptcy court pursuant to its general powers under 11 U.S.C. §105(a) should issue an order canceling the bond so that "surety Ranger Insurance Company and its agents and bank do not assume any liability" with respect to canceling the bond. (Emphasis added.)

No cases were cited in support of this proposition. Nor was there a statement that this relief fell within the bankruptcy court's core or "non-core, related to" jurisdiction. In fact, the relief was specifically stated to be for the benefit of Ranger and not the estate. Moreover, nowhere in the moving papers did Najor give notice or request that Ranger be *released* from all liability under the bond.

Ateeq filed, through his state court attorney, an opposition to Najor's Notice. Pursuant to Bankruptcy Local Rule 9014-5(c) issued by the United States Bankruptcy Court for the Southern District of California, in effect at the time of Najor's Notice, Ateeq was required to file an opposition to the Notice or the relief would have been granted. Ateeq's opposition asserted, among other things, that Najor cited "no

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See Carter Baron Drilling v. Excel Energy Corp., 76 B.R. 172, 173 (D. Colo. 1987). (Bond is meant "to secure the prevailing party against any loss, like insolvency of debtor, sustained as a result of being forced to forego execution on a judgment during the course of an ineffectual appeal.")

law to support his argument that the court should cancel an undertaking;" that Najor "has not cited nor has Mr. Ateeq found any case permitting the cancellation of an undertaking once a bond has been posted by the surety;" and:

> If the court wishes to order Ranger Insurance Company to turn over the $300,000 pursuant to 11 U.S.C. §542, that is one thing, but to couple it with *cancelling an undertaking* placed under the authority of California Code of Civil Procedure 917.1 *without express statutory authority* or case authority, seems to be expanding unnecessarily into uncharted waters. (Emphasis added.)

Ranger took no part in the hearing; it did not file any pleadings nor appear at the hearing to consent to the full adjudicatory jurisdiction of the bankruptcy court.[6] Despite Ateeq's written opposition to the motion and Ateeq's oral objection at the hearing that the proceeding was not proper and included litigating issues between Ateeq and Ranger, the motion was granted at the hearing on December 17, 1992; and the bankruptcy court orally ordered the turnover of collateral and cancellation of the bond. The bankruptcy court made no findings as to its jurisdiction to enter such an order as required by 28 U.S.C. §157(b)(3). The Order canceling the bond was entered on January 5, 1993 (the "Bond Cancellation Order").

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The bond issued by Ranger set forth the address for service of pleadings on Ranger as required by CCP § 995.320(a)(2). The proof of service of Najor's Notice does not reflect service at Ranger's stated address.

Despite no motion made to the bankruptcy court or notice given regarding the release of Ranger's liability and no ruling by the bankruptcy court, the Bond Cancellation Order also provided that: "Ranger...is *released from all liability in connection with the bond.*" (Emphasis added.)

On May 4, 1993, the Court of Appeal, Fourth Appellate District, Division 1, affirmed the State Court Judgment in favor of Ateeq. *Ateeq v. Najor*, 15 Cal.App. 4th 1351 (1993).

D. Proceedings Below

1. Bankruptcy Court Disposition

Ateeq then filed his motion to set aside the Order canceling the bond or alternatively for relief from judgment pursuant to FRCP 60(b). Among the grounds for the motion were that the bankruptcy court lacked jurisdiction to cancel the bond or enter a final order regarding the bond.

Both Najor and Ranger opposed Ateeq's motion. Conspicuously absent from both Najor's and Ranger's opposition was the jurisdiction of the bankruptcy court to collaterally attack the Superior Court's order requiring the bond in the first place and the bankruptcy court's jurisdiction to release Ranger from all liability in connection with the bond.

In denying Ateeq's motion, the bankruptcy court, rather than articulate its reasoning and findings on the record, merely adopted Ranger's points and authorities. Those findings included: 1) "that GEORGE ATEEQ *consented to jurisdiction*," and "that under *Mann v. Alexander Dawson*, 907 F.2d 923 (9th Cir. 1990), the *failure* by GEORGE ATEEQ *to timely object* to the January 5, 1993 order was the

equivalent of consenting to the court's jurisdiction" (Finding 18); 2) that the bankruptcy court had "core" jurisdiction in rendering its initial decision based on 28 U.S.C. § 157 (Finding 19); and 3) that as an "[a]lternative to core jurisdiction, the Court further finds that it had supplemental jurisdiction" over the cancellation of the bond. (App. B4-B5.) (Emphasis added.)

On November 22, 1995, the bankruptcy court orally denied Ateeq's motion and on February 21, 1996, the bankruptcy court entered its written Order denying Ateeq's motion (App. C1) along with the findings of fact and conclusions of law submitted by Ranger (App. B1), from which an appeal was taken to the BAP.

2. Bankruptcy Appellate Panel Disposition

On January 24, 1997, the BAP issued its memorandum affirming the bankruptcy court. The BAP ruled that: (1) There is no time limitation imposed on bringing a FRCP 60(b)(4) motion[7]; (2) the relationship between the collateral and the bond cancellation "arguably" gave the bankruptcy court core jurisdiction; (3) there was some *unspecified* conceivable effect on Najor's reorganization process; (4) the bankruptcy court's jurisdiction rose at least to the level of "related to" jurisdiction; (5) the bankruptcy court did not err in finding that Ateeq had consented to entry of a final order by not objecting to the bankruptcy court's jurisdiction; and (6) the bankruptcy court did not abuse its

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[7] This is in direct contradiction to finding No. 17 made by the bankruptcy court (App. B4).

discretion in denying the motion to vacate under FRCP 60(b)(6).

3. Panel Disposition

On appeal, a panel of the Ninth Circuit affirmed the bankruptcy court's denial of Ateeq's FRCP 60(b) motion. The panel determined that the bankruptcy court had "non-core, related to" jurisdiction over the bond cancellation issue. The panel also determined that Ateeq's failure to expressly *object* to the bankruptcy court's jurisdiction amounted to implied consent to the bankruptcy court's jurisdiction under *Mann v. Alexander Dawson (In re Mann)*, 907 F.2d 923, 926 (9th Cir. 1990). However, the panel did not address the express consent requirements of FRBP 7008 and 7012.

The panel held that the bankruptcy court did not clearly err by determining that cancellation of the bond would have a "conceivable" effect on the estate. However, the bankruptcy court never found it had "non-core, related to" jurisdiction over the bond cancellation issues nor did it determine that the bond cancellation issues would have a "conceivable" effect on the bankruptcy estate, .

For the first time, the panel specified the "conceivable" effect the bond cancellation had on the estate: 1) it reduced the estate's monthly administrative expenses by $13,000; 2) it redistributed the collateral supporting the bond from the surety to the estate; and 3) it reprioritized creditors, by removing Ranger as a priority creditor on the cash and real property that collateralized the bond.

The panel also determined that Ateeq's due process rights were not violated, although the panel never addressed the lack of notice regarding the release of Ranger's liability. Although not raised by Ateeq on appeal, the panel also

concluded that relief was not proper under FRCP 60(b)(6).

4. Disposition of Rehearing Petition

Ateeq filed a petition for rehearing, arguing that the panel may have overlooked or misapprehended important points of law and/or facts presented in the appeal as follows:

1) The panel stated that the "bankruptcy court did not clearly err by determining that cancellation of the bond would have a 'conceivable' effect on the estate." However, the bankruptcy court never made such a determination. The bankruptcy court held that it had "core" jurisdiction or "supplemental jurisdiction" over the bond. Moreover, all issues regarding the bond were subject to the prior jurisdiction of the Superior Court. The bond was filed in the Superior Court and was subject to a comprehensive set of statutes governing all aspects of an appeal bond from its filing to release of liability. California Bond and Undertaking Law, Code of Civil Procedure §§ 995.010 - 996.560. There was no discussion of how the prior jurisdiction over the bond and the parties in connection with the bond was taken away from the Superior Court and placed in the bankruptcy court.

2) The panel overlooked the evidence which showed that Ranger already drew down on the full amount of the letter of credit and no longer needed to look to the bankruptcy estate for payment of the annual bond premium of $13,000. No evidence existed showing that the "estate's monthly administrative expenses" were reduced by $13,000.

3) The panel overlooked that the proceeds of the letter of credit were not property of the estate and therefore not subject to turnover as property of the estate under 11 U.S.C. § 542. It should be inconceivable for a bankruptcy court to order turnover of property that is *not* property of the estate

and have such an improper act constitute the requisite "conceivable" effect to confer jurisdiction.

4) The panel overlooked the facts regarding the letter of credit in holding that the cancellation of the bond "reprioritized creditors, because Ranger, the surety on the bond, was removed as a priority creditor on the cash and real property that collateralized the bond." Ranger was the owner of the cash, not a creditor regarding the cash proceeds of the letter of credit. Additionally, the real property securing the second deed of trust was over encumbered, so Ranger did not have a secured interest in the real property which could be "reprioritized" by the cancellation of the bond.

5) The panel overlooked the requirement for express consent to full adjudicatory jurisdiction contained in FRBP 7008(a) and 7012(b). The panel and the bankruptcy court relied upon the holding in *In re Mann*, 907 F.2d at 926, that failure to object to the bankruptcy court's jurisdiction in a timely manner constitutes implied consent to a bankruptcy judge to hear and determine and to enter appropriate orders in "non-core, related to" matters pursuant to 28 U.S.C. § 157(c)(2). However, *Mann* fails to consider or address the express consent requirement of the Bankruptcy Rules.

6) The panel overlooked evidence submitted by Ateeq that the original notice and motion filed by Najor did not request a release of liability for Ranger, yet such a release is included in the order entered by the bankruptcy court.

The panel denied Ateeq's petition.

V. REASONS FOR GRANTING THE WRIT

A. The Jurisdiction Of The Bankruptcy Courts Is Expressly Limited By Statute.

One of the prerequisites for a valid judgment is that the rendering court must have jurisdiction over the subject matter of the action. *In re Taylor*, 884 F.2d 478, 481 (9th Cir. 1989). A judgment is regarded as void when the court that rendered the judgment lacked jurisdiction over the subject matter of the action. *In re Center Wholesale*, 759 F.2d 1440, 1448 (9th Cir. 1985).

This Court has established that the jurisdiction of the bankruptcy courts is grounded in and limited by statute. *Celotex Corp. v. Edwards*, 514 U.S. 300, 115 S.Ct. 1493, 1498 (1995). As a general rule, a bankruptcy court does not have jurisdiction in controversies, as here, between third parties not involving the debtor or property of the estate. *Baker & Taylor Drilling Co. v. Stafford*, 369 F.2d 551, 556 (9th Cir. 1966).

An analysis of bankruptcy court jurisdiction involves a two-step process. First, whether bankruptcy subject matter jurisdiction is vested in the district court is determined under 28 U.S.C. §1334. *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988). Second, if jurisdiction is vested in the district court, the extent to which the bankruptcy court, rather than the district court, can exercise that jurisdictional grant depends upon an analysis of 28 U.S.C. §157.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line, Co.*, 458 U.S. 50, 102 S. Ct. 2858 (1982), this Court held that Congress could not constitutionally empower a non-Article III judge to adjudicate a state breach of contract action (based on a pre-petition contract) brought by a debtor

against a defendant that had not filed a claim in bankruptcy court.[8] This Court held that the Constitution reserved for Article III courts traditional functions of judicial power such as adjudicating state breach of contract claims. *Id.* at 84, 102 S.Ct. 2878. Congress's broad grant of jurisdiction to the bankruptcy courts to adjudicate such claims in the Bankruptcy Act of 1978 was found to be unconstitutional.

Sections 1334 and 157, delineating the jurisdictional boundaries of the bankruptcy court to act, were in response to *Marathon*. These new sections created a statutory distinction between core and non-core proceedings, and restricted the power of the bankruptcy court to adjudicate the latter. *Matter of Wood*, 825 F.2d 90, 93 (5th Cir. 1987).

The holding in *Marathon* requires, at a minimum, that all claims filed in bankruptcy court "must be able to stand on their own as either core or related proceedings." *In re Guild and Gallery Plus, Inc.*, 72 F.3d 1171, 1182 (3d Cir. 1996). Related proceedings do not become core solely by virtue of the fact that they purport to arise out of the same occurrence or transaction as core proceedings. *In re Bennett*, 154 B.R. 126, 135 (Bankr. N.D. N.Y. 1992).

Once jurisdiction is found in the district court, Title 28 automatically empowers the bankruptcy court to hear *and* determine all cases under Title 11 and any and all *core* proceedings arising under Title 11 or *core* proceedings arising

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The debtor in *Marathon* had brought a suit in the bankruptcy court for breaches of contract and warranty, misrepresentation, coercion and duress. *Id.* at 2864. The claims arose entirely under state law. *Id.* at 2881. In the case at bar, Najor sought to cancel a state court bond, in place pursuant to state law procedures in a pending state court action, and to release Ranger from all liability, including the liability owed to Ateeq under the bond.

in a case under Title 11. 28 U.S.C. §157(b) defines "core proceedings" as ones "arising under Title 11, or arising in a case under Title 11". *In re Eastport Associates*, 935 F.2d 1071, 1076 (9th Cir. 1991). Thus, for a proceeding to be a core proceeding permitting the bankruptcy court to have full adjudicatory powers over the cause of action, the proceedings must meet *both* the 1334(b) and 157(b)(2) requirements. 28 U.S.C. §157(b)(1); *Eastport Associates*, 935 F.2d at 1076.

1. The Bankruptcy Courts May Only Hear And Determine Proceedings Arising Under Title 11 Or Arising In Cases Under Title 11.

28 U.S.C. §1334(b) grants to federal district courts "original but not exclusive jurisdiction of all civil proceedings *arising under* title 11, or *arising in* or *related to* cases under title 11." (Emphasis added.)

Proceedings that "arise in or arise under title 11" encompass matters that are at the core of the jurisdiction of the bankruptcy courts, and "depend upon the application or construction of bankruptcy law as expressed in Title 11." *In re Leco Enterprises, Inc.*, 144 B.R. 244, 248 (S.D.N.Y. 1992). The phrase "arising under title 11" describes only those proceedings that involve a cause of action "created or determined" by statutory provisions of title 11. *Id.* "Arising in" proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have *no* existence outside of the bankruptcy. *Eastport Associates*, 935 F.2d at 1076.

28 U.S.C. §157(a) provides that a district court may refer to the bankruptcy judges cases or proceedings over which the district court has jurisdiction pursuant to §1334(b). However, §157 does not grant bankruptcy courts full subject

matter jurisdiction over matters which the district court has subject matter jurisdiction under §1334(b). Rather, §157 allows the district court to place only a *limited* jurisdiction with the bankruptcy court to enter certain orders.

The proceeding to cancel the state court appeal bond and release Ranger from all liability in connection with the bond was not based on any right created by the federal bankruptcy law; it was based solely on state-created rights enacted for the protection of judgment creditors like Ateeq and if there had been no bankruptcy, such an action could have proceeded in state court (although would have been contrary to a specific set of statutes designed to prevent exactly what happened here). *Wood*, 825 F.2d at 97.

However, rather than address the bankruptcy court's finding of core jurisdiction, the Ninth Circuit determined that the bankruptcy court had "non-core, related to" jurisdiction.

2. The Bankruptcy Court May Only Hear Proceedings Related To Cases Under Title 11.

A bankruptcy judge lacks subject matter jurisdiction to enter a final order determining a "non-core, related to" proceeding because of the constraint of 28 U.S.C. § 157(c)(1), which is designed to comply with the restrictions of Article III as interpreted by *Marathon*. However, 28 U.S.C. § 157(c)(2) nevertheless empowers a bankruptcy judge to exercise complete judicatory power over a "non-core, related to" proceeding with the consent of all of the parties to the proceeding.

The test for determining whether a civil proceeding is "related to" bankruptcy is "whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins*,

743 F.2d 984, 994 (3rd Cir. 1984). However, there must be some "reasonable nexus or logical connection" and a proceeding that has "only a vague or incidental connection with a pending case in bankruptcy, or the resolution of which may have only a speculative, indirect or incidental effect on the bankruptcy estate, is unrelated to the bankruptcy estate within the meaning of section 1334" *Showalter v. Rinard*, 126 B.R. 596, 599 (D. Or. 1991). In fact, while this Court has recognized the definition of "related to" jurisdiction formulated in *Pacor*, the Court noted that although Congress intended the "related to" language to evidence a jurisdictional "grant of some breadth," it was not intended to be "limitless." *Celotex*, 115 S.Ct. at 1499.

Unlike a core matter where a bankruptcy judge can *hear and determine* a proceeding, in a "non-core, related to" matter, the bankruptcy court can *only hear* a proceeding and submit proposed findings of fact and conclusions of law to the district court, which after *de novo* review, will enter a final order. 28 U.S.C. §157(c)(1). Although the bankruptcy court *did not* find "non-core, related to" jurisdiction, it found that Ateeq had consented to the bankruptcy court's unconditional assumption of jurisdiction. The Ninth Circuit found no error in the bankruptcy court's determination of consent.

If a proceeding is non-core and only related to a case under Title 11, the bankruptcy court lacks subject matter jurisdiction to enter a final order absent the consent of the parties. *In re Daniels-Head & Associates*, 819 F.2d 914, 918 (9th Cir. 1987). Thus, if the action is a non-core proceeding, express consent is a prerequisite to the bankruptcy court obtaining subject matter jurisdiction to hear and determine such a proceeding.

B. The Bankruptcy Court May Not Exercise The Full Adjudicatory Power Of The District Court Unless The Parties Expressly Consent To The Bankruptcy Court's Jurisdiction To Hear And Determine A "Non-Core, Related To" Matter.

Ateeq argued below that the bankruptcy court lacked subject matter jurisdiction over the bond and thus lacked any jurisdictional power to enter an order canceling the state court bond. Even if the Ninth Circuit's conclusion that the bond cancellation issues were the subject of the bankruptcy court's "non-core, related to" jurisdiction is correct, which Ateeq does not concede, the exercise of full adjudicatory power by a non- Article III judge, *without the express consent of the parties*, is an unconstitutional exercise of the judicial power of the United States.

1. Express Consent Must Be Given Before The Bankruptcy Court May Hear And Determine A "Non-Core, Related to" Matter.

28 U.S.C. §157(c) provides that a bankruptcy judge may only *hear* a proceeding that is not a core proceeding but that is otherwise *related* to a case under title 11 and *shall submit proposed findings of fact and conclusions of law to the district court*. However, the district court with the *consent of all the parties to the proceeding*, may refer a "non-core, related to" proceeding to a bankruptcy judge to hear *and* determine and to enter appropriate orders and judgments.

In recognition of the inherent unfairness of a system under which consent could be found by implication and in order to effectively implement 28 U.S.C. § 157, FRBP 7008(a) and 7012(b) were amended in 1987 to specifically

require that parties in an adversary proceeding state whether the matter is core or non-core and whether the party *expressly* consents to jurisdiction. The Advisory Committee Note to the 1987 Amendment to Rule 7008 makes clear that: "[f]ailure to include the statement of consent does not constitute consent. *Only express consent* in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding." (Emphasis added.)

The Advisory Committee Note to the 1987 Amendment to Rule 7012 also makes clear that a "final order of [sic] judgment may not be entered in a non-core proceeding heard by a bankruptcy judge *unless all parties expressly consent.*" (Emphasis added.) By ruling out consent by implication, the Bankruptcy Rules sought to preserve the constitutionality of the bankruptcy courts' "non-core, related to" jurisdiction.

It is entirely inconsistent with due process to hold that express consent *is* required when a turnover action is properly brought as an adversary proceeding as required by FRBP 7001(1), but express consent *is not* required if that very same relief is improperly requested in the form of a motion, as was the case here. It should be the relief requested and not the form of the relief which governs the bankruptcy court's jurisdiction. It is clear that Ateeq never expressly consented to the bankruptcy court's jurisdiction to enter an order regarding the bond. In the absence of that express consent and in light of the lack of any conceivable effect on the estate, the bankruptcy court lacked jurisdiction to cancel the bond and release Ranger from liability and the order is void. *See, In re Brickell Inv. Corp.*, 922 F.2d 696, 701-702 (11th Cir. 1991). (In *Brickell*, the Eleventh Circuit applied the express consent requirement of Bankruptcy Rule 7012(b) even though

no adversary proceeding was filed.)

Moreover, 28 U.S.C. § 157(b)(3) provides that the "bankruptcy judge shall determine, on the judge's own motion or on timely motion of the party, whether a proceeding is a core proceeding...or is a proceeding that is otherwise related to a case under Title 11." It is a critical and mandatory duty of the bankruptcy judge to initially determine the nature of the proceeding before it as either core or non-core. *In re Nell*, 71 B.R. 305, 311 (D. Utah 1987).

Even if the parties do not move for such a determination as to the nature of the proceeding, the ultimate responsibility to do so lies with the bankruptcy judge. *Id.* at 311. Failure of the bankruptcy judge to make such a determination deprives the bankruptcy court of jurisdiction and the failure of the parties to request the finding does not waive the right to later object that the finding was a necessary predicate to jurisdiction. *In re Marill Alarm Systems, Inc.*, 81 B.R. 119, 122 (S.D. Fla. 1987) aff'd 861 F.2d 725 (11th Cir. 1988).

A party in an arguably related proceeding cannot be held to have consented impliedly or otherwise to full subject matter jurisdiction of the bankruptcy court until the judge by his own motion explicitly determines the proceeding to be non-core. *Id.* at 123.

Therefore, because the bankruptcy court failed to make a determination of the status of the proceedings at the time of Najor's Notice, and because Ateeq never expressly consented to jurisdiction, the bankruptcy court's entry of the Bond Cancellation Order was unconstitutional.

2. Not All Parties Expressly Consented To The Bankruptcy Court's Full Adjudicatory Jurisdiction.

The bankruptcy court erroneously found that Ateeq, by his failure to expressly object, consented to the jurisdiction of the bankruptcy court to enter a final order regarding the cancellation of the state court appeal bond and release of Ranger from all liability in connection with the bond. However, a review of Ateeq's opposition to Najor's motion and the transcript of the hearing on December 17, 1992, reveals that Ateeq's state court attorney repeatedly, and strenuously, in writing and orally, objected to the bankruptcy court's adjudication of Ateeq's rights under the bond. There is no express consent by Ateeq.

Not only was it necessary that Ateeq *expressly* consent to any order that the bankruptcy court issued in regard to a non-core related matter, but *all* parties to the proceeding must expressly consent. 28 U.S.C. §157(c)(2).

As set forth above, Ranger neither filed any pleadings nor appeared at the hearing on Najor's motion, and therefore, could not have expressly consented to the bankruptcy court's entry of an order canceling the state court appeal bond. In fact, the bankruptcy court originally stated during the hearing that the "insurance company" would have to come in separately to bring an action to cancel the state court appeal bond. The "silence of a missing party is thin support for a conclusion that the party abandoned its entitlement to a decision maker holding office under Article III." *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 750 (7th Cir. 1989).

Immediately following the bankruptcy court's determination that Ranger would have to separately bring an

action to cancel the appeal bond, Najor's proposed new counsel, who was not retained as counsel for Ranger, stated to the bankruptcy court that Ranger consented to whatever order the court issued concerning cancellation of the bond. Such a hearsay statement, not made under oath by counsel who was not retained by Ranger, could not amount to consent *by* Ranger. Therefore, because not *all* of the parties expressly consented to the entry of a final order regarding cancellation of the appeal bond, the bankruptcy court's entry of a final order was an unconstitutional exercise of the judicial power of the United States.

C. Implied Consent To The Bankruptcy Court's Entry Of A Final Order In a "Non-Core" Matter Is Insufficient To Confer Full Adjudicatory Jurisdiction Regarding The Cancellation Of The State Court Appeal Bond And Release Of Ranger's Liability.

The Ninth Circuit held that because Ateeq failed to timely object to the bankruptcy court's entry of a final order regarding the cancellation of the state court appeal bond, Ateeq impliedly consented to the entry of such an order. The Ninth Circuit, like the bankruptcy court, relied on *In re Mann*, 907 F.2d at 923 for such a holding.

In *Mann*, the debtor filed an adversary proceeding in the bankruptcy court and never objected to the court's jurisdiction prior to the time it rendered judgment against him. *Id.* at 926. The Ninth Circuit determined that since the debtor *initiated and pursued* a proceeding and *did not object* before a non-article III tribunal, that such conduct constituted a waiver of his article III rights and thus he impliedly consented to the bankruptcy court to hear and determine a

related non-core proceeding.[9] *Id.* *Mann* never discussed the express consent requirement of FRBP 7008(a) and 7012(b).

The Ninth Circuit in *Mann* relied on its decision in *Daniels-Head*, supra, for the proposition that consent may be implied by conduct. However, in *Daniels-Head*, the Ninth Circuit expressly recognized:

> The 1984 Act, on the other hand, does not, on its face, require explicit consent. The fact that Congress failed to include any provision for explicit consent in the 1984 Act indicates that consent implied from the parties' actions is sufficient. *Daniels-Head*, 819 F.2d at 919.

Now, of course, Congress through the 1987 amendments to the Bankruptcy Rules has remedied that oversight by requiring express consent to the exercise of full adjudicatory jurisdiction by the bankruptcy court in "non-core, related to" proceedings.

Ateeq did not initiate or pursue any proceeding in bankruptcy court regarding cancellation of the bond and release of Ranger's liability nor was Ateeq a debtor who sought bankruptcy court protection. Ateeq merely filed an opposition to Najor's Notice and then strenuously objected to the bankruptcy court's authority and ability to cancel the state court appeal bond in his opposition papers and during the

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[9] This Court in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 106 S.Ct. 3245 (1986) held that a waiver of Article III rights may be implied from initiating and pursuing a proceeding before a non-Article III tribunal. However, *Schor* does not stand for the proposition that a waiver will generally be implied from conduct.

hearing itself. Ateeq's argument that the bankruptcy court was "without express statutory authority" can reasonably be interpreted to include statutory jurisdictional authority. Thus, Ateeq did timely object to the exercise of jurisdiction and never expressly consented to jurisdiction as contemplated by the Bankruptcy Rules.

A court should not lightly infer from a litigant's conduct to have private state-created rights adjudicated by a non-article III bankruptcy judge. To do so would violate the spirit of *Marathon*, which emphasizes that the power to adjudicate private rights cannot be lodged in a court lacking the essential attributes of judicial power. *In re Men's Sportswear, Inc.*, 834 F.2d 1134, 1138 (2nd Cir. 1987).

In light of the proscriptions in *Marathon* depriving non-article III tribunals the subject matter jurisdiction to adjudicate private state-created rights without the consent of all the parties, implying consent is an unconstitutional exercise of the judicial power of the United States. Moreover, in recognition of the inherent unfairness of the principle under which consent could be found by implication and the inconsistency of the bankruptcy court's application of 28 U.S.C. § 157(c)(2), the Bankruptcy Rules were amended in 1987, requiring *express* written consent to satisfy the consent requirement of 28 U.S.C. § 157(c)(2). Najor should not benefit from his failure to follow proper procedure to deprive Ateeq of valuable property rights.

VI. CONCLUSION

The Ninth Circuit's reliance on *In re Mann* ignores the requirement for express consent by all parties before a bankruptcy judge may hear and determine a matter subject to its "non-core, related to" jurisdiction. *Mann* does not address the 1987 change in the Bankruptcy Rules which requires express consent to entry of a final order by a bankruptcy judge in such circumstances. As reflected in the Advisory Committee Notes, the "failure to include the statement of consent does not constitute consent. Only express consent in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding." (Advisory Committee Note to Rule 7008 (1987).)

It is clear that Congress intends that no longer can a bankruptcy judge obtain jurisdiction by a party's silence, which would be a return to "jurisdiction by ambush." Ateeq did not expressly consent to entry of a final order by the bankruptcy court. Nor did Ranger. If the failure to include a written statement of consent does not constitute consent, it is inconceivable that failure to specifically object to jurisdiction can constitute express consent to jurisdiction. Najor never alleged the jurisdiction of the bankruptcy court to hear and determine the motion to cancel the bond and the bankruptcy court never made a finding of its jurisdiction before it entered the Order canceling the bond. This is exactly the type of situation for which the express consent requirement was designed.

The Ninth Circuit has overlooked the express consent requirement. This Court should resolve the conflict between the Ninth and Eleventh Circuits and decide whether consent to full adjudicatory power in a "non-core, related to"

proceeding may be implied when there is an express consent requirement.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: October 20, 1998

Respectfully submitted,

ROY L. CARLSON, JR.
Counsel of Record

MILBERG & DE PHILLIPS, P.C.

Attorneys for Petitioner
GEORGE ATEEQ

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 1, 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In re: ELIA NAJOR, aka Louie) Najor aka Elia M. Najor, Debtor.	No. 97-55501 BAP No. SC-96-01236-AJV
GEORGE ATEEQ, Appellant, v. ELIA NAJOR; RANGER INSURANCE COMPANY, Appellees.	MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Ashland, Jones, and Volinn, Judges, Presiding

Argued and Submitted June 4, 1998
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts in this circuit except as provided by Ninth Circuit Rule 36-3.

Before: O' SCANNLAIN, TROTT, and FERNANDEZ, Circuit Judges.

George Ateeq challenges the bankruptcy court's and Bankruptcy Appellate Panel's (BAP) denial of his Rule 60(b) motion to set aside a bond cancellation order. The bankruptcy court issued the order along with an order to turn over collateral pursuant to 11 U.S.C. § 542 (1988). We have jurisdiction pursuant to 18 U.S.C. § 158(d), and we affirm.

I

Mr. Ateeq argues that the bankruptcy court lacked jurisdiction to order the turnover of collateral and to order cancellation of an appeal bond. Under Federal Rule of Civil Procedure 60(b)(4), an order is void if a court lacked subject matter jurisdiction over the matter. *See Owens-Corning Fiberglass Corp. v. Center Wholesale, Inc. (In re Center Wholesale, Inc.)*, 759 F.2d 1440, 1448 (9th Cir. 1985). Because turnover is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E), we need only address whether the bankruptcy court had jurisdiction to order cancellation of the appeal bond.

"The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in and limited by statute." *Celotex Corp. v. Edwards,* 514 U.S. 300, 307, 115 S. Ct. 1493, 1498 (1995). "Title 28 U.S.C. § 1334(b) provides that the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under Title 11, or arising in or related to cases under Title 11." *Id.* The district court can refer any of these proceedings to the bankruptcy courts. *Id.* (citing 28 U.S.C. § 157(a)). Thus, the bankruptcy court's jurisdiction must also arise under, arise in, or relate to cases under Title 11. *Id.*

A bankruptcy court's "related to" jurisdiction is very broad, "including nearly every matter directly or indirectly related to bankruptcy." *Mann v. Alexander Dawson (In re*

Mann), 907 F.2d 923, 926 n.4 (9th Cir. 1990). Thus, jurisdiction is proper if the "outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Fietz v. Great Western Sav. (In re Fietz),* 852 F.2d 455, 457 (9th Cir. 1988). Jurisdiction exists even if the proceeding is not against the debtors or their property. *Id.*

In the instant case, the bankruptcy court had jurisdiction over, and properly heard, the bond cancellation issue under its "related to" jurisdiction. The bankruptcy court did not clearly err by determining that cancellation of the bond would have a "conceivable" effect on the estate. The issues of turning over collateral supporting the bond and cancelling the bond were intertwined. Together, the actions: (1) reduced the estate's monthly administrative expenses by $13,000, because bond premium payments were eliminated; (2) redistributed the collateral supporting the bond from the surety to the estate; and (3) reprioritized creditors, because Ranger, the surety on the bond, was removed as a priority creditor on the cash and real property that collateralized the bond.

Ateeq contends that even if the bankruptcy court had jurisdiction to hear the matter, it did not have power to issue the order under its "related to" jurisdiction. *See* 28 U.S.C. § 157(c). We disagree. "A related proceeding with the consent of all parties functionally has the same effect as a core proceeding, permitting the bankruptcy court to enter a final judgment, order, or decree." *Daniels-Head & Assocs. v. William M. Mercer, Inc. (In re Daniels-Head & Assocs.),* 819 F.2d 914, 918 (9th Cir. 1987) (quotation and citation omitted). Failure to object to the bankruptcy court's jurisdiction in a timely manner "constitutes implied consent to the resolution of the controversy." *In re Mann,* 907 F.2d at 926.

Although Ateeq objected to the turnover of collateral and to cancellation of the bond during the hearing, he failed to object to the bankruptcy court's jurisdiction to decide the issues. He did not object to the bankruptcy court's jurisdiction until almost two and one-half years later, when he was unable to collect on his subsequent, successful state appeal.

Ateeq's failure to object at the hearing or in a timely manner after the hearing amounts to implied consent to the bankruptcy court's jurisdiction under *In re Mann*. Therefore, we affirm the BAP's and the bankruptcy court's denial of Ateeq's Rule 60(b) motion based on lack of subject matter jurisdiction.

II

Ateeq also challenges the process by which the court decided the bond cancellation issue. He claims the procedure used by the court violated his right to due process. An order issued in a manner inconsistent with due process is void. *See In re Center Wholesale*, 759 F.2d at 1448.

Bankruptcy Rule 7001(1) governs turnover proceedings under 11 U.S.C. § 542. Rule 7001(1) requires the debtor in possession or the trustee to bring a request for turnover in an adversary proceeding. *See id.* However, Najor requested turnover of collateral via motion. His request for bond cancellation was part of the same motion.

Contested matters brought by motion are addressed in Bankruptcy Rule 9014. Rule 9014 requires "reasonable notice and opportunity for a hearing" to be afforded to the adversary. *See id.* In *Fortune & FAAL v. Zumbrun (In re Zumbrun),* 88 B.R. 250, 252 (B.A.P. 9th Cir. 1988), the BAP held that Rule 9014's requirements of notice and hearing adequately protect due process rights, even if the matter should have been brought as an adversary proceeding under Bankr. R. 7001(1).

Because Ateeq "did not object to the form of the proceeding until [two and one-half years] after it was held, [he] is in a poor position to complain that the bankruptcy court failed to label the proceeding 'adversarial' or invoke Rule[] ...7001." *See Trust Corp. of Montana v. Patterson (In re Copper King Inn, Inc.*, 918 F.2d 1404, 1406 (9th Cir. 1990). Therefore, on the facts of this case, *In re Zumbrun* is determinative. Despite the technical deficiency of the proceeding, Ateeq was adequately protected by the notice and hearing requirements of Rule 9014. Ateeq had the opportunity to be heard and was represented by counsel who argued the merits of turnover and bond cancellation. He also had notice of Najor's bond cancellation request. The motion for turnover was filed twenty-eight days before the hearing, and included the bond cancellation issue.

We affirm the BAP's and the bankruptcy court's denial of Ateeq's Rule 60(b)(4) motion.

III

The bankruptcy court did not abuse its discretion by denying Ateeq's Rule 60(b)(6) motion based on his claim that the order amounted to a collateral attack on a prior state court order. Courts grant Rule 60(b) motions only in exceptional circumstances. *Alexander v. Bleau (In re Negrete),* 183 B.R. 195, 197 (B.A.P. 9th Cir. 1995); *affirmed,* 103 F.3d 139 (9th Cir. 1996). Further, a Rule 60(b) motion should be brought within a reasonable time. *See* Fed. R. Civ. P. 60(b); Bankr. R. 9024. Although Ateeq's situation is unfortunate, his objection to the bankruptcy court's order was neither timely nor exceptional.[1] AFFIRMED.

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[1] We, of course, express no opinion on the merits of the bankruptcy court's bond cancellation decision.

APPENDIX B

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Attorney for: RANGER INSURANCE COMPANY

ENTERED
Clerk, U.S. Bankruptcy Court
FEB 22, 1996
Southern District of California
By Deputy

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re ELIA NAJOR aka LUIE NAJOR aka ELIA M. NAJOR, Debtor,	CASE NO. 92-08844-H11 FINDINGS OF FACT AND CONCLUSIONS OF LAW COURTROOM 3 HON. JOHN J. HARGROVE

The motion to set aside order exonerating bond came regularly before the court on November 22, 1995, at the United States Bankruptcy Court, Southern District of California, at 11:00 a.m. in Courtroom 3 before the Honorable John J. Hargrove. Russell M. DePhillips of Milberg &

DePhillips appeared, representing GEORGE ATEEQ. Carlos E. Sosa of Hausman & Sosa appeared, representing the opposing party, RANGER INSURANCE COMPANY.

THEREFORE, the court finds as follows:

1. That RANGER INSURANCE COMPANY ("RANGER") is a surety authorized to conduct business in the State of California;

2. On April 12, 1991, RANGER issued an undertaking under Code of Civil Procedure § 917.1 in the amount of $674,000, Bond No. 212971. This bond was an appeal bond in a then pending case entitled *George Ateeq v. Elia Najor,* case number 599758 pending in the Superior Court of California, County of San Diego. The named obligee on the bond was GEORGE ATEEQ and ELIA NAJOR ("DEBTOR"), was the bond principal.

3. The purpose of the bond was to prevent execution by GEORGE ATEEQ of a judgment against ELIA NAJOR in the superior court action *Ateeq v. Najor,* case number 599758. On February 14, 1991, ATEEQ received a judgment on special verdict against ELIA NAJOR. The total amount of the judgment was for $404,056.

4. The bond issued by RANGER was filed in the proceeding pending appeal by ELIA NAJOR, preventing enforcement of the judgment by GEORGE ATEEQ.

5. ELIA NAJOR appealed the adverse judgment, in an appellate proceeding before the Court of Appeal, Fourth Appellate District (Division One) of the State of California. That proceeding was entitled *George Ateeq v. Elia Najor,* case number B014363.

6. As part of the consideration and to induce RANGER to issue the bond, NAJOR caused to be issued in favor of RANGER an irrevocable letter of credit with First Western Bank, N.A. This letter of credit was in the sum of

$300,000.

7. As additional consideration to induce RANGER to issue the bond, NAJOR executed a "Short Form Deed of Trust Assignment of Rents" naming RANGER as beneficiary, in the amount of $374,000 for certain property located in San Bernardino, California.

8. Both the cash deposit of $300,000, in the form of the letter of credit, as well as the deed of trust for $374,000, constituted collateral demanded by RANGER as part of the consideration for RANGER's issuance of the appeal bond on behalf of the debtor, NAJOR.

9. But for RANGER's receipt of the collateral, RANGER would not have issued the bond to NAJOR.

10. RANGER had a security interest or lien in the cash proceeds relating to the letter of credit, as well as in the deed of trust recorded by the debtor.

11. On or about July 27, 1992, NAJOR filed a voluntary petition in bankruptcy, seeking protection under Chapter 11.

12. On May 4, 1993, the Court of Appeal affirmed the judgment in favor of GEORGE ATEEQ and against NAJOR.

13. In about December 1992, NAJOR made a motion to this court seeking the turnover of property, and exoneration of the bond. NAJOR's motion sought return of all property in the possession of RANGER used for purposes of collateral: specifically, the cash proceeds relating to the letter of credit- as well as the deed of trust.

14. On January 5, 1993, the United States Bankruptcy Court for the Southern District of California, the Honorable John J. Hargrove, issued an order granting the debtor's motion for turnover of property and ordering cancellation of bond.

15. RANGER thereafter, in compliance with the court's order, released all security. This security constituted the cash held by RANGER (minus deductions for premiums) as well as a full reconveyance of all property interests held by RANGER in accordance with the security agreement with the debtor.

16. GEORGE ATEEQ did not file any timely appeal of the court's January 5, 1993 order exonerating the bond and requiring return of collateral.

17. The court now finds that GEORGE ATEEQ failed to make a proper showing under Federal Rule of Civil Procedure 60 (including subsection 6) given the lengthy period of time which elapsed since the January 5, 1993 order versus the present motion. GEORGE ATEEQ was represented by counsel when that prior motion was briefed and argued.

18. The court also finds that GEORGE ATEEQ failed to file any appeal of the January 5, 1993 order. Moreover, if that January 5, 1993 order is considered a "interlocutory order," the court finds that GEORGE ATEEQ consented to jurisdiction. The court also finds that under *Mann v. Alexander Dawson, 907 F.2d 923 (9th Cir. 1990),* the failure by GEORGE ATEEQ to timely object to the January 5, 1993 order was the equivalent of consenting to the court's jurisdiction.

19. The court also finds that it had "core" jurisdiction in rendering its initial decision, and this core jurisdiction is based upon 28 U.S.C. § 157, in the expansive jurisdiction for core proceedings authorized under that section. Being that the disposition of the collateral was directly linked to the court's order exonerating the bond, the court finds that the issue of exoneration of the bond is linked to any decision concerning the validity or extent of

RANGER's lien upon collateral posted by NAJOR with RANGER. The court further finds that the ruling in *Celotex v. Edwards, -- U.S. --, 115 S. Ct. 1493 (1995)* does not apply in this case.

20. Alternative to core jurisdiction, the Court further finds that it had supplemental jurisdiction over the exoneration of RANGER's bond given that this decision formed a part of the same "case or controversy" relating to the court's determination of the extent and/or validity of RANGER's lien upon property posted as collateral by NAJOR.

The Court denies the motion brought by GEORGE ATEEQ for reconsideration of its prior order, and directs that its concurrently filed order be entered in a manner consistent with these findings.

DATED: 2-21-96 /s/ JOHN J. HARGROVE
THE HON. JOHN J. HARGROVE

Submitted by:
DATE: February 8, 1996

HAUSMAN & SOSA

By: /s/ LARRY D. STRATTON
LARRY D. STRATTON
Counsel for RANGER INSURANCE COMPANY

APPENDIX C

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Attorney for: RANGER INSURANCE COMPANY

ENTERED
Clerk, U.S. Bankruptcy Court
FEB 22, 1996
Southern District of California
By Deputy

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re ELIA NAJOR aka	)	Case No. 92-08844-H11
LUIE NAJOR aka	)	
ELIA M. NAJOR,	)	FINAL ORDER RE
	)	MOTION
	)	TO SET ASIDE ORDER
	)	EXONERATING BOND
	)	
	)	COURTROOM 3
Debtor,	)	HON. JOHN J. HARGROVE
	)	

The motion to set aside order exonerating bond came regularly before the court on November 22, 1995, at the United States Bankruptcy Court, Southern District of

California, at 11:00 a.m. in Courtroom 3 before the Honorable John J. Hargrove. Russell M. DePhillips of Milberg & DePhillips appeared, representing GEORGE ATEEQ. Carlos E. Sosa of Hausman & Sosa appeared, representing the opposing party, RANGER INSURANCE COMPANY.

THEREFORE, THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES AS FOLLOWS:

1. That the motion to set aside order exonerating bond is hereby denied. This order is entered in favor of RANGER INSURANCE COMPANY, and against GEORGE ATEEQ.

DATED: 2-21-96 /s/ JOHN J. HARGROVE
THE HON. JOHN J. HARGROVE

Submitted by:

DATE: February 8, 1996

HAUSMAN & SOSA

By: /s/ LARRY D. STRATTON
LARRY D. STRATTON
Counsel for RANGER INSURANCE COMPANY

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 28, 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In re: ELIA NAJOR, aka Louie Najor aka Elia M. Najor, Debtor.	No. 97-55501 BAP No. SC-96-01236-AJV ORDER
GEORGE ATEEQ, Appellant, v. ELIA NAJOR; RANGER INSURANCE COMPANY, Appellees.	

Before: O' SCANNLAIN, TROTT, and FERNANDEZ, Circuit Judges.

The petition for rehearing is DENIED.

APPENDIX E

Article III, Section 1 of the United States Constitution provides, in relevant part:

> The judicial Power of the Unites States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The **Fifth Amendment to the United States Constitution** provides, in relevant part:

> No person shall be ... deprived of life, liberty or property, without due process of law....

The **Tenth Amendment to the United States Constitution** provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 157 provides, in relevant part:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all

core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(b)(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(c)(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to

the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 1334(b) provides:

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Rule 7008(a) of the Federal Rules of Bankruptcy Procedure ("FRBP"), provides in relevant part:

In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

FRBP Rule 7012(b), provides in relevant part:

A responsive pleading shall admit or deny an allegation that the proceeding is core or

non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

Supreme Court, U.S.
FILED
DEC 15 1998
OFFICE OF THE CLERK

No. 98-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE ATEEQ,
Petitioner,

vs.

ELIA NAJOR, RANGER INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I
JURISDICTION

The respondent Ranger Insurance Company ("RANGER") does not contest jurisdiction over this Petition under 28 U.S.C. §1254(1).

II
STATUTES AND CONSTITUTIONAL PROVISIONS

RANGER disputes the Petitioner regarding the pertinent provisions of 28 U.S.C. §157. The applicable portions of 28 U.S.C. §157 are as follows:

> (2) Core proceedings include, but are not limited to -
>
> (A) matters concerning the administration of the estate;
>
> . . .
>
> (E) orders to turn over property of the state;
>
> . . .
>
> (K) determinations of the validity, extent, or priority of liens;
>
> . . .
>
> (M) orders approving the use or lease of property, including the use of cash collateral;

. . .

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

11 U.S.C. §361 provides, in pertinent part:

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by -
>
> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
>
> (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
>
> (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable

equivalent of such entity's interest in such property.

11 U.S.C. §363 provides in pertinent part:

> (a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.
>
> . . .
>
> (c)(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless --
>
> (A) each entity that has an interest in such cash collateral consents; or
>
> (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.
>
> . . .

> (e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

Rule 8002 of the Federal Rules of Bankruptcy Procedure ("FRBP") provides in pertinent part:

> The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order or decree appealed from.

III
QUESTIONS PRESENTED

Given the Petitioner's failure to properly identify the issues in this petition, RANGER submits the following:

1. Did the Bankruptcy Court act within its jurisdiction in issuing the turnover order of January 5, 1993?

2. Did the Bankruptcy Court exercise "core" jurisdiction in issuing the January 5, 1993 order, including the bond exoneration aspect?

3. Alternatively, did the petitioner consent to the court exercising "related to" jurisdiction in its issuance of the January 5, 1993 order?

4. Did the Bankruptcy Court act within its proper discretion in denying the Petitioner's Rule 60(b) motion?

IV
INTRODUCTORY STATEMENT

This Petition is based upon numerous "straw man" arguments. GEORGE ATEEQ ("ATEEQ") seeks to set aside a 1993 Bankruptcy Court order which, among other things, exonerated a state court appeal bond written by RANGER. However, ATEEQ is overly narrow in his issue specification: he claims the issue is whether a bankruptcy judge may constitutionally hear and determine this action as a "related to" proceeding, under 28 U.S.C. §157.

But the Ninth Circuit Court of Appeal focused upon other matters. ATEEQ failed to appeal the adverse 1993 order, failing to pursue any attack of the order until nearly three years after entry. The Bankruptcy Court entered its order on January 5, 1993, but ATEEQ failed to file his motion for relief under Federal Rule of Civil Procedure 60(b) until late 1995.

During this nearly three year interim, RANGER relied upon and complied with the Bankruptcy Court's 1993 order by releasing collateral of $300,000 plus a security interest in 29 acres of real property, as required by the order. ATEEQ understandably ignored this inconvenient fact in his Petition, also forgetting that if the January 5, 1993 order were now vacated, RANGER would be severely prejudiced. ATEEQ's essential claim is that the Bankruptcy Court lacked jurisdiction to make the January 5, 1993 order. However, as noted by the Ninth Circuit, ATEEQ consented to the Bankruptcy Court's jurisdiction. *Memo. Dec. at 4.*[1]

---

[1] The Petition for Certiorari is cited as "Pet. ___." The Appendices to the Petition are cited as "Pet. App. __." The Appendix to this Brief in (continued...)

ATEEQ's petition is ripe for denial. He not only fails to accurately address the facts, but he fails to show any compelling reason for relief. Under the directly analogous *Celotex Corp. v. Edwards, 514 U.S. 300, 131 L.Ed.2d 403, 115 S.Ct. 1493 (1995)*, this Court has already ruled that Bankruptcy Court jurisdiction is "at least" non-core.

In his petition, ATEEQ introduced misstatements and matters outside of the trial court and appellate record, necessitating the following factual discussion.

V
STATEMENT OF THE CASE

A Ranger's Issuance of the State Court Appeal Bond

ATEEQ was a plaintiff, and a cross-defendant, in an action pending before the Superior Court for San Diego County, California, entitled *George Ateeq v. Elia Najor, Case No. 599758*. In that action ATEEQ sought general and punitive damages against defendant, ELIA NAJOR ("NAJOR"). The lawsuit resulted in an April 16, 1991 judgment, awarding ATEEQ a total judgment of $404,056 against NAJOR. NAJOR timely appealed the judgment to the California Court of Appeal.

NAJOR, thereafter, applied to RANGER for an appeal bond, to stay ATEEQ's further enforcement of the judgment pending the appeal. RANGER ultimately issued an appeal bond on about April 12, 1994 for $674,000, naming NAJOR

---

[1] (...continued)
Opposition is cited as "App. __." The Ninth Circuit's unpublished Memorandum of Decision is cited as "Memo. Dec. ___." The Excerpts of Record on file with the Ninth Circuit are cited as "ER __."

as the bond principal, and ATEEQ as the obligee. This bond stayed further enforcement of the judgment pending the state court appeal.

As a condition precedent to RANGER's issuance of the bond, RANGER required that ATEEQ post collateral with RANGER; RANGER also required that ATEEQ execute an indemnity agreement. ATEEQ met these conditions, posting with RANGER collateral consisting of (1) an irrevocable letter of credit issued by First Western Bank in the amount of $300,000, naming RANGER as beneficiary;[2] (2) a security agreement entitled a "Collateral Receipt and Agreement" in the amount of $374,000 against real property, consisting of 29 acres of land in Victorville, California; and (3) a "Short Form Deed of Trust and Assignment of Rents" against the same 29 acres of land in Victorville, California, naming RANGER as beneficiary. As RANGER's representative testified in a Bankruptcy Court declaration, "[b]ut for the deposit of collateral in this case, RANGER would not have written the bond." *App. at C5.*

B Najor's Chapter 11 Bankruptcy Petition

On about July 27, 1992, NAJOR filed a voluntary petition with the United States Bankruptcy Court, Southern District of California, under Chapter 11.

C Najor's Turnover Motion

On about November 19, 1992, NAJOR filed a "motion for turnover of property" with the Bankruptcy Court. The motion sought turnover of the collateral to the bankruptcy

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[2] RANGER later demanded a full draw down on the $300,000 letter of credit, retaining the proceeds as collateral, minus bond premium.

estate, to pay "ongoing administrative expenses, to make adequate protection payments and to otherwise reorganize his financial affairs." *App. at A2.* Contrary to ATEEQ's present assertion that there was "*no mention* in the Notice [of motion] of the *release of liability* of Ranger" [emphasis in original] *[Pet. at 6]*, the Notice of Motion in fact stated there would be a "hearing regarding the Debtor-in-Possession's motion for turnover of the collateral supporting the undertaking obtained by NAJOR with respect to the appeal of the judgment in *Ateeq v. Najor*, San Diego Superior Court Case No. 599758 *and for cancellation of the undertaking*." [Emphasis added] *App. at A1.*

In addition to this statement in the notice of motion, NAJOR's supporting points and authorities argued for cancellation of the bond. NAJOR urged the Bankruptcy Court "issue an order canceling the undertaking." *ER at 46.* Similarly, NAJOR's counsel addressed the nexus between the release of RANGER's collateral and the need for bond exoneration. The declaration supporting NAJOR's motion argued that "[b]ased on the collateral which NAJOR and his wife posted for the undertaking, on April 12, 1991, Ranger Insurance Company issued an undertaking in the sum of $675,000.00." *ER at 51.*

ATEEQ's opposition papers also reflected his counsel's understanding that NAJOR's motion sought bond exoneration. ATEEQ specifically opposed cancellation of RANGER's undertaking. For example, ATEEQ argued that NAJOR "has not cited nor has Mr. Ateeq found any case permitting the cancellation of an undertaking once the bond has been posted by the surety." *ER at 81.* Moreover, ATEEQ's counsel argued against bond exoneration during oral argument of that motion.

The Bankruptcy Court rejected ATEEQ's argument, and on January 5, 1993 ordered turnover of property and cancellation of the bond. The court ordered, *inter alia*, that the "collateral which NAJOR posted for the bond shall be turned over to the bankruptcy estate . . ." and that RANGER "is released from all liability in connection with the bond and the Collateral Receipt Agreements for the $300,000.00 and the 29 acres dated April 11, 1992 . . ." *App. at B2-B3 (¶3)*. The Bankruptcy Court ordered that RANGER return the entire $300,000, including the premium which was previously deducted. *App. at B2 (¶2(a))*.

ATEEQ's counsel approved the proposed turnover order arising out of this ruling "as to form." That proposed order was to be executed by the Bankruptcy Court judge. *App. at B3*. ATEEQ thus agreed to this dispositive order being made by the Bankruptcy Court judge, a fact evident from the form of the order. On January 5, 1993 the Bankruptcy Court entered the turnover and bond exoneration order. *App. at B1-B3; Pet. App. at B3 (Finding 14)*. ATEEQ never appealed that order. *See Pet.App. at B4 (Finding 16)*. ATEEQ had a ten (10) day period to file a notice of appeal. *FRBP 8002*.

RANGER complied with the order, releasing the collateral. As RANGER's representative declared, RANGER "returned the collateral in compliance with the court's order." Moreover, "had RANGER been aware of any future attack by Mr. Ateeq [upon the January 5, 1993 order] RANGER would not have acted as it did." Moreover, "had RANGER known that Mr. Ateeq had intended to attack the aspect of the order exonerating the bond, RANGER would have sought to stay the aspect of the order requiring the return of collateral until the bond liability issues were finally resolved." [Emphasis in original] *App. at C4-C5 (Trevino Declaration)*.

D Ateeq's 1995 Attack Upon the 1993 Order

ATEEQ's first direct attack upon the January 5, 1993 order came nearly three years later. In late 1995, ATEEQ filed a motion to set aside the order, and sought relief under Federal Rule of Civil Procedure 60(b). ATEEQ sought to set aside the aspect of the 1993 order canceling the bond. For the first time in that motion, ATEEQ made new assertions, including a claim that the Bankruptcy Court was without jurisdiction in entering the January 5, 1993 order. ATEEQ also asserted that RANGER did not have a "valid" interest in the 29 acres of real property posted as collateral. ATEEQ claimed, for example, that the deed of trust was not properly executed. *Pet. at 4, n.1.* ATEEQ did not make the claim three years earlier, in his opposition to the 1992-93 turnover motion.[3]

ATEEQ also asserts in the present Petition that the letter of credit was not an asset of the estate. *Pet. at 5, n.2.* ATEEQ, however, did not make this argument until he reached the appellate level, following the Bankruptcy Court's 1995 denial of his 1995 set aside motion.[4] Notwithstanding

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[3] Even then, ATEEQ's "evidence" that the trust deed inaccurately described the real property was a declaration by ATEEQ's new counsel, allegedly memorializing conversations and/or a "fax" from a "customer service representative" of a title insurer. *ER at 156.*

[4] Before the Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") and the Ninth Circuit, RANGER argued that while the letter of credit may or may not have been an asset of the estate, the collateral posted with the issuing bank to secure the letter of credit (which NAJOR almost certainly posted) *was* estate property. This issue was never originally raised by ATEEQ, however. ATEEQ did not raise this "issue" in the Bankruptcy Court. The issue is res judicata through ATEEQ's failure to appeal a now final January 5, 1993 order. Moreover, the Bankruptcy Court factually found the cash to

(continued...)

these arguments, the Bankruptcy Court factually found that these assets constituted collateral, to which the estate had a claim in the turnover proceeding. *Pet.App. at B2-B4.*

The Bankruptcy Court denied ATEEQ's motion seeking to set aside the order exonerating the bond. In the Findings of Fact and Conclusions of Law, the Bankruptcy Court found that it had "core" jurisdiction under 28 U.S.C. §157 to issue the 1993 turnover order. *Pet. App. at B4. (Finding 19).* Alternatively, the Court found that it had "related to" jurisdiction, and that ATEEQ had consented to jurisdiction. *Id. at B4 (Finding 18).* The Bankruptcy Court alternatively found that it had supplemental jurisdiction over ATEEQ.

Moreover, the Bankruptcy Court found that the security posted by NAJOR, the debtor, was recorded as an inducement to issue the bond, and that "[b]ut for Ranger's receipt of the collateral, Ranger would not have issued the bond to Najor." *Id. at B3 (Finding 9).*

E Proceedings Before the Lower Appellate Courts

ATEEQ appealed the denial of his Rule 60(b) motion to the Ninth Circuit BAP. The BAP affirmed the Bankruptcy Court, determining that the Bankruptcy Court's jurisdiction in the 1993 proceeding "rose *at least* to the level of 'related to' jurisdiction . . ." [Emphasis added] *ER at 202-03 (BAP Memorandum Decision).* The BAP also found that ATEEQ consented to Bankruptcy Court jurisdiction, and that supplemental jurisdiction may also exist. The BAP also noted

---

[4] (...continued)
be an asset of the estate. *Pet.App. at B3 (¶8).* It is the fault of ATEEQ if he failed to fully litigate this matter.

ATEEQ's failure to appeal, and that "there was no real explanation for the nearly three year delay in bringing the motion to vacate." *ER at 205.* The BAP affirmed the Bankruptcy Court.

ATEEQ thereafter appealed to the Ninth Circuit. The Ninth Circuit affirmed the BAP's decision. *Memo. Dec. at 1 et seq.* The Ninth Circuit also denied ATEEQ's Petition for rehearing.

VI
THE PETITION MAKES NUMEROUS MISSTATEMENTS OF FACT AND LAW

Throughout this litigation before the Bankruptcy Court, the BAP, and the Ninth Circuit Court of Appeal, ATEEQ has failed to accurately address the pertinent issues. For example, ATEEQ ignores the obvious prejudice to RANGER if the Bankruptcy Court's order turnover of property and "cancellation of bond" entered January 5, 1993 were reversed. ATEEQ ignores the plain fact that RANGER was compelled to comply with the Bankruptcy Court's order by returning the collateral to the estate, and that any reversal of the January 5, 1995 order would unalterably prejudice RANGER as a result.

RANGER disputes ATEEQ's factual statement through reasons which include the following:

1. ATEEQ repeatedly asserts that NAJOR's 1993 turnover motion did not give notice that RANGER's bond would be "released" from liability. *See, e.g., Pet. at 6, 7.* This claim is false. NAJOR's notice and moving papers gave specific notice that NAJOR sought bond exoneration. *See App. at A2; see also ER at 39, 40, 46, 47.*

The reporter's transcript of the 1993 proceedings showed that ATEEQ's counsel, Mr. Schmidt, understood that bond exoneration was being litigated at that hearing. For example, Mr. Schmidt argued that while he had no problem with the turnover of collateral, he disputed "the court telling [Ranger] Insurance Company they [no] longer have to have the bond posted." *ER at 122:2-4. See also ER at 123-128.*

2. ATEEQ never attacked or questioned Bankruptcy Court jurisdiction during the 1992-93 proceeding, although he now argues that he previously objected to the motion as being "not proper." *Pet. at 8.* What is meant by "not proper" is not explained. Plainly, ATEEQ never disputed Bankruptcy Court jurisdiction. ATEEQ's vague argument implicitly acknowledges that he never disputed Bankruptcy Court jurisdiction in that earlier hearing.

3. ATEEQ claims that he did not expressly submit to the Bankruptcy Court's "related to" jurisdiction; that the cause was never adjudicated by the District Court. *Pet. at 17-19.* However, not only did ATEEQ participate in the proceeding, failing to raise any jurisdictional issue, but he expressly agreed to the "form" of the final order which specifically designated the issuing judge as "the Honorable John J. Hargrove, U.S. Bankruptcy Court Judge." *App. at B3.* The order is nothing less than a final order. ATEEQ consented to jurisdiction.

4. The Bankruptcy Court specifically and factually found the nexus between the collateral posted by NAJOR with RANGER, and RANGER's issuance of the bond. This finding is within the "Findings of Fact and

Conclusions of Law." *Pet. App. at B1 et seq.*[5] The court found the letter of credit and real property collateral acted as "consideration" for the bond's issuance. *Pet. App. at B2-B3 (Findings 6 and 7). See also, Pet. App. at B3 (Finding 9) (bond issuance dependent upon RANGER's receipt of collateral).*

5. ATEEQ effectively ignores the link between the collateral and RANGER's issuance of the $674,000 appeal bond. ATEEQ makes the unsubstantiated claim that its collateral was not *really* a part of the bankruptcy estate, or alternatively that RANGER was not fully secured. *Pet. at 6.* However, again, ATEEQ ignores the Bankruptcy Court's factual findings that RANGER "had a security interest" in the property, and that RANGER relied upon receipt of the collateral when issuing the bond. *Pet. App. at B3-B4 (Findings 8, 9, 10, 15).*[6]

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[5] ATEEQ argues that the Bankruptcy Court mindlessly adopted RANGER's findings. *Pet. at 9.* Presumably, ATEEQ would not have insulted the Bankruptcy Court in this fashion had that court agreed with *his* position.

[6] ATEEQ lectures NAJOR in the Petition, arguing that NAJOR "should have" sought to remove the state court case and should have sought abstention. *Pet. at 6, n.4.* This legal advice is bizarre in light of the fact that this entire proceeding is ATEEQ's attempt to shift responsibility upon RANGER for a situation *he* created.

Even now, ATEEQ's effort to blame others continues. ATEEQ filed a separate state court action against RANGER entitled *Ateeq v. Ranger Insurance Company*, case no. 701607 (San Diego Superior Court), alleging that RANGER committed "bad faith" in failing to pay ATEEQ the cancelled bond. ATEEQ has thus far failed to convince any state court that RANGER is at fault for complying with a Bankruptcy Court order. ATEEQ appealed an adverse trial court judgment to the California Court of Appeal (case no. D027820), where the case is now pending.

6. ATEEQ's failure to timely attack the January 5, 1993 order foreclosed RANGER from seeking relief from that order, which directed that RANGER "shall" turn over the collateral posted for the bond over to the Bankruptcy estate.

7. ATEEQ asserted that the Bankruptcy Court "*did not* find 'non-core, related to' jurisdiction." [Emphasis in original] *Pet. at 18.* This distorts the Bankruptcy Court's findings, because the Bankruptcy Court found that ATEEQ consented to Bankruptcy Court jurisdiction, as in the case *In re Mann, 907 F.2d 923 (9th Cir. 1990). See Pet. App. at B4 (Finding 18). In re Mann* was a non-core case. Thus, contrary to ATEEQ's assertion, the Bankruptcy Court *did* find non-core jurisdiction through its adoption of the *In re Mann* holding.

VII
REASONS FOR DENYING THE WRIT

ATEEQ's jurisdictional arguments have been disregarded by *three* lower courts. First, the Bankruptcy Court made not only legal determinations but also *factual* determinations contrary to ATEEQ's position. Both the BAP and the Ninth Circuit have rejected ATEEQ's jurisdictional argument. RANGER addresses some of the bases for denying this writ in the following paragraphs.

A Ateeq Inaccurately Claims That He Had No Prior Notice That Najor Sought Bond Exoneration

ATEEQ's application is replete with misstatements, and failures to disclose significant matters to this Court. As stated in the Rules, a petitioner's failure to present with accuracy "whatever is essential to ready and adequate

understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." *Rules of the Supreme Court ("Rules"), Rule 14(4).*

Repeatedly, ATEEQ asserts that NAJOR's 1992-93 turnover motion did not include any "mention" of a "release of liability" of RANGER. *Pet. at 6.* Apparently in an effort to raise due process concerns, ATEEQ argues in his petition that "nowhere in the moving papers did Najor give notice or request that Ranger be *released* from all liability under the bond." *Pet. at 7.*

The Petitioner is playing semantical games. Because the original turnover motion papers called for "cancellation of the undertaking," ATEEQ's premise is false. Moreover, ATEEQ's counsel during the 1992 hearing on the turnover motion clearly understood the nature of the hearing, and the nature of the relief NAJOR sought.

B The 1992-1993 Proceeding Before the Bankruptcy Court Was a Core Proceeding Given the Proven Nexus Between Ranger's Collateral and the Turnover Order

ATEEQ asserts but fails to demonstrate that the 1992-1993 Bankruptcy Court proceeding was not core. ATEEQ argues that the turnover proceeding (relating to bond exoneration) was "not based on any right created by the Federal Bankruptcy Law; it was based solely on state-created rights . . ." *Pet. at 17.* This, however, begs the issue.

In enacting the legislation ultimately codified as 28 U.S.C. §157, Congress broadly interpreted those matters deemed "core." As stated in 28 U.S.C. §157, core proceedings include "*but are not limited to*" "(A) matters concerning the administration of the estate; . . . (E) orders to

turnover property of the estate; . . . [and] (K) determinations of the validity, extent, or priority of liens." [Emphasis added] *28 U.S.C. §157(b)(2)(A), (E), and (K)*. In addition, "core" proceedings include those "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship." *28 U.S.C. §157(b)(2)(O)*.

Notwithstanding ATEEQ's assertions, NAJOR's motion for turnover addressed matters related to the "administration of the estate." *28 U.S.C. §157(b)(2)(A)*. NAJOR identified the primary purpose for his motion as the need for assets, for reorganization purposes. As NAJOR stated in his original motion, the $300,000 cash collateral and other property RANGER held was required "to pay ongoing administrative expenses, to make adequate protection payments and to otherwise reorganize [NAJOR's] financial affairs." *App. at A2*. This aspect of the order was also "core" because it dealt with property of the estate. Core proceedings also include "orders to turnover property of the estate." *28 U.S.C. §157(b)(2)(E)*.

Additionally, RANGER held a security interest in the collateral. RANGER held a security interest in the $300,000 cash, and an interest in the lien on the 29 acres of land located in Victorville, California. RANGER thus had a due process right -- even an "adequate protection" right -- to have its security interests protected. *See generally, 11 U.S.C. §§ 361, 363*. Providing for the adequate protection of RANGER's security interest is required, and mandatory. The adequate protection doctrine exists to prevent impairment of a secured creditor's secured position. *See United States v. Booth Tow Services, 64 Bankr. 539 (W.D. Mo. 1985)*. Adequate protection is mandated in the Code "when requested by an appropriate entity as a matter of right and not as a matter of

discretion." *2 Collier on Bankruptcy 15 §361.01 [361-6] (1996).*

Throughout these proceedings, ATEEQ has attempted to dissect the January 5, 1993 order into two elements: a "turnover" component and a "release of bond" component. In the prior proceedings, ATEEQ even suggested -- oblivious to the doctrine of federal preemption -- that the Bankruptcy Court somehow erred in allegedly failing to follow California's procedures for canceling or releasing sureties. This flawed position has evolved into ATEEQ's present argument that the Bankruptcy Court dealt with "state-created rights" and that the order was "contrary to a specific set of statutes designed to prevent exactly what happened here . . ." *Pet. at 17.* Obviously, the Supremacy Clause gives the federal bankruptcy courts plenary power over matters embraced in the bankruptcy statutes. *See In re Careau Group, 923 F.2d 710, 711-12 (9th Cir. 1991).*

Yet, ATEEQ's claim that the turnover motion was not a core proceeding cannot be correct. The Bankruptcy Court made a specific *factual* finding that RANGER would not have issued the bond but for the security *[Pet. App. at B3 (Finding 9)]* and that the collateral constituted "security" to which RANGER had a property right. *Pet. App. at B3 (Findings 10, 15).* Thus, ATEEQ's argument is not only contrary to the explicit factual findings of the Bankruptcy Court, but the inherent link between the collateral and the bond brings the issue into the Bankruptcy Court's core jurisdiction. Not only does the Bankruptcy Court's "core" jurisdiction pertain to the determinations "of the validity, extent, a priority of liens" but also to the adjustment of the debtor-creditor relationship or the debtor's relationship with "equity security holder[s]." *28 U.S.C. §157(b)(2)(K), (O).*

But for the turnover motion,[7] RANGER's collateral would not have been at risk. The fact that NAJOR sought turnover generated the possibility of an uncompensated loss of RANGER's secured position. Thus, turnover and bond exoneration were inexorably linked, and if the turnover aspect of the 1993 order constituted a core proceeding, so must the bond exoneration aspect of that order.

Moreover, bankruptcy court jurisdiction is more broadly interpreted in a Chapter 11 case, such as this one. In a strongly analogous case, this Court held that an execution upon a state court supersedeas bond was "*at least* 'related to'" [emphasis added] the bankruptcy of the bond principal. *Celotex Corp. v. Edwards, 514 U.S. 300, 309, 131 L.Ed.2d 403, 115 S.Ct. 1493, 1500 (1995).* The jurisdiction of Bankruptcy Courts extend more broadly in a Chapter 11 reorganization than in the case of a Chapter 7 liquidation. *Id. at 310.*

C In Any Event, There Was "Related To" Jurisdiction to Which Ateeq Consented

ATEEQ essentially concedes the existence of "related to" jurisdiction. However, ATEEQ argues that the Bankruptcy Court was without jurisdiction to enter the order absent ATEEQ's express consent; that under the statute, only the District Court had the authority to enter such an order. *See Pet. at 18 et seq.*

However, ATEEQ's claim that he did not expressly consent is simply untrue. ATEEQ's claim is contradicted by his conduct at the time of the hearing. As stated in *In re Mann,* a non-core proceeding, the failure to object to court

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[7] By definition, turnover is a "core" matter. *28 U.S.C. §157(b)(2)(E).*

jurisdiction constitutes consent. *In re Mann, 907 F.2d at 925-26; In re Daniels-Head & Assoc., 819 F.2d 914, 918 (9th Cir. 1987).* ATEEQ incorrectly assumes that express consent may only be conferred through a written document or by a specific affirmation. However, this is wrong. For example, in *In re Southern Industrial Banking, 809 F.2d 329, 331 (6th Cir. 1987),* affirmative acts constituted the consent required to confer jurisdiction in a non-core case. *Id. at 331.* Throughout the 1992-1993 proceeding, ATEEQ fully consented to the proceeding. ATEEQ also allowed RANGER to rely upon the order. RANGER released the collateral pursuant to the January 1993 order; RANGER will *never* be able to retrieve its secured position if the order is set aside.

ATEEQ also asserts a conflict between circuits, claiming that *In re Brickell Investment, 922 F.2d 696 (11th Cir. 1991) ("Brickell")* conflicts with the Ninth Circuit on the issue of consent by conduct in non-core cases. However, *Brickell* involved a fee award against the Internal Revenue Service ("IRS") where the IRS' alleged "consent" to bankruptcy court jurisdiction was their filing of a proof of claim. Moreover, *Brickell,* a case which has been frequently questioned and criticized by other Circuit decisions, based its holding upon an interpretation of the Equal Access to Justice Act, 26 U.S.C. §7430.[8]

Nevertheless, numerous courts agree that consent may be implied from conduct of the parties. *See e.g., Abramowitz v. Palmer, 999 F.2d 1274, 1280 (8th Cir. 1993).* The failure to object to a Bankruptcy Court's assumption of core

---

[8] *See, e.g., In re Grewe, 4 F.3d 299, 300 (4th Cir. 1993), cert. denied, 114 S.Ct. 1056 (1994)* (contrary to *In re Brickell,* the Bankruptcy Court is a "court of the United States" within the meaning of the EAJA). *See also In re Yochum, 89 F.3d 661, 665-68 (9th Cir. 1996).*

jurisdiction constitutes "consent" and permits the Bankruptcy Court to enter the order or judgment. *In re Men's Sportswear, 834 F.2d 1134, 1137-38 (2nd Cir. 1987).* An objection after such consent "more closely resembles an afterthought than a bona fide objection." *Id. at 1138.*

In any event, ATEEQ in fact expressly consented to jurisdiction. He approved the form of the proposed turnover order. *App. at B3.* ATEEQ could have objected to the form of the order by (for example) insisting that it be only a recommendation to the District Court Judge and not a final order. ATEEQ could have refused to sign it. However, ATEEQ expressly approved the final order, allowing its execution by Judge Hargrove, Bankruptcy Court Judge. Under any interpretation, ATEEQ expressly consented to bankruptcy court jurisdiction.

VIII
CONCLUSION

Based on the foregoing, RANGER requests that the petition be summarily denied.

Respectfully submitted,

Counsel of Record
CARLOS E. SOSA
LARRY D. STRATTON

LAW OFFICES OF
HAUSMAN, SOSA & HUDSON, LLP

Attorneys for: Respondent,
Ranger Insurance Company

APPENDIX A

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Attorney for Debtor-In-Possession
ELIA NAJOR

FILED
Clerk, U.S. Bankruptcy Court
NOV 19, 1992
Southern District of California

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: Elia Najor, aka Louie Najor, aka Elia M. Najor, Debtor-In-Possession	Case 92-08844 H 11 NOTICE OF MOTION AND MOTION BY DEBTOR-IN-POSSESSION ELIA NAJOR FOR TURNOVER OF PROPERTY [11 U.S.C. Section 542] DATE: December 17, 1992 TIME: 10:00 a.m. DEPT: Three

TO THE UNITED STATES TRUSTEE, CREDITOR GEORGE ATEEQ, HIS ATTORNEYS DONALD SCHMIDT AND JENNIFER HASSO-NAJM, DOUGLASS FINANCIAL CORPORATION, RANGER INSURANCE COMPANY, GROSSONT BANK, AND THOSE PARTIES FILING REQUEST FOR SPECIAL NOTICE:

YOU ARE HEREBY NOTIFIED that on December 17, 1992 at 10:00 a.m. in Department Three of the United States Bankruptcy Court located at 940 Front Street, Fifth Floor, San Diego, California 92189, there will be a hearing regarding the Debtor-in-Possession's Motion for turnover of the collateral supporting the undertaking obtained by NAJOR with respect to the appeal of the judgment in *Ateeq v. Najor*, San Diego Superior Court Case No. 599758 and for cancellation of the undertaking.

The motion will be pursuant to 11 U.S.C. § 542 on grounds that

(1) the undertaking is no longer necessary given that plaintiff George Ateeq is an unsecured creditor who is prevented from executing on his judgment by virtue of the automatic stay (11 U.S.C. §362(a));

(2) George Ateeq has no security interest in the collateral securing the undertaking on appeal; and,

(3) NAJOR needs the $300,000 cash and the property he posted as collateral for the undertaking to pay ongoing administrative expenses, to make adequate protection payments and to otherwise reorganize his financial affairs.

This motion is based on this notice of motion and motion, the supporting memorandum of points and authorities and declaration of Brian P. Ballo, the papers and files in this case, and on such other oral and documentary evidence as may be presented at the time of the hearing on this matter.

Any opposition or other response to this motion must

be served on the undersigned and the original and one copy of such papers and proof of service must be filed with the Clerk of the Bankruptcy Court at 940 Front Street, Room 5-N-26, San Diego, California 92189, not later than eleven (11) days before the hearing date.

Respectfully submitted,
Dated: November 19, 1992
LAW OFFICES OF BRIAN P. BALLO

By: /s/ BRIAN P. BALLO
Attorney for Debtor-In-Possession
ELIA NAJOR

APPENDIX B

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Attorney for the Debtor-In-Possession
ELIA NAJOR

FILED
Clerk, U.S. Bankruptcy Court
JAN 5, 1993
Southern District of California
By Deputy

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: Elia Najor, aka Louie Najor, aka Elia M. Najor, Debtor-In-Possession	)	Case 92-08844 H 11 ORDER GRANTING DEBTOR-IN-POSSESSION'S MOTION FOR TURNOVER OF PROPERTY AND CANCELLATION OF BOND

On December 17, 1992 at 10:00 a.m. in Department Three of the above entitled court, Debtor-in-Possession ELIA NAJOR's ("NAJOR") Motion for Turnover of Property and Cancellation of Bond came on regularly for hearing. Brian P. Ballo, Esq. and Gary Rudolph, Esq. appeared for Debtor-in-Possession NAJOR; Donald Schmidt, Esq. appeared for creditor GEORGE ATEEQ ("ATEEQ").

Having read the papers both in favor and against NAJOR's motion, and having heard the oral arguments of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED:

1. That Bond #DLP0212971, issued by Ranger Insurance Company on April 12, 1991 as undertaking for NAJOR's appeal in *Ateeq et al v. Najor et al.* San Diego Superior Court Case No. 599758, be and hereby is cancelled; and

2. That pursuant to Bankruptcy Code 542(a), the collateral which NAJOR posted for the bond shall be turned over to the bankruptcy estate as follows:

a) The $300,000.00 cash, plus interest, controlled by Douglas Financial Corporation and Ranger Insurance Company (including the 1992 bond premium of $13,490.00) and held by Grossmont Bank ($286,581.35, plus interest from August 31, 1992, in Account No. 82921), shall be transferred to an interest bearing, blocked account maintained by Brian P. Ballo, counsel for the Debtor-in-Possession, at San Diego Trust and Savings Bank, separate from the Debtor-in-Possession bank account, that will not be released to any party or person without further order of this court, and;

b) Ranger Insurance Company shall execute a Reconveyance of the $374,000.00 deed of trust on 29 acres of raw land in Victorville, California (APN: 477-421-36-40,-42), and;

3. That Ranger Insurance Company is released from all liability in connection with the bond and the Collateral

Receipt Agreements for the $300,000.00 and the 29 acres dated April 11, 1992, and;

4. That the automatic stay shall be partially lifted so as to permit the state Court of Appeal to render a decision in NAJOR's appeal of *Ateeq, et al v. Najor, et al.* (San Diego Superior Court, Case No. 599758; Court of Appeal, Case No. D014363). The automatic stay, however, shall remain partially in effect so as to prevent creditor ATEEQ from taking any action either prior to or after the decision by the state Court of Appeal, during the pendancy of this bankruptcy case, to collect on the judgment, without further order of this court.

DATED: JAN 05, 1993

/s/ JOHN J. HARGROVE
THE HON. JOHN J. HARGROVE
U.S. BANKRUPTCY COURT JUDGE

APPROVED AS TO FORM:

LAW OFFICES OF DONALD SCHMIDT

By: /s/ DONALD SCHMIDT DATED: 12/22/92
Donald Schmidt, Attorney for
Creditor GEORGE ATEEQ

APPENDIX C

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Attorney for: RANGER INSURANCE COMPANY

FILED
Clerk, U.S. Bankruptcy Court
NOV 8, 1995
Southern District of California

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re ELIA NAJOR aka LUIE NAJOR aka ELIA M. NAJOR, Debtor,	CASE NO. 92-08844-H11 DECLARATION OF FRANCES V. TREVINO IN OPPOSITION TO MOTION TO SET ASIDE ORDER DATE: NOVEMBER 9, 1995 TIME: 10:00 A.M. COURTROOM 3

DECLARATION OF FRANCES V. TREVINO

I, Frances V. Trevino, declare as follows:

1. I am an employee and Surety Claims Examiner of RANGER INSURANCE COMPANY ("RANGER"), and I have been in that capacity for all times relevant to this

declaration. I have personal knowledge of all matters stated in this declaration. I am a competent adult, and can testify that each and every matter stated herein is true, accurate, and correct.

2. Moreover, I am a custodian of records of RANGER. I have the custody and control of the underwriting and claims file in the above-referenced case, and can testify that each and every document attached to this declaration is a true and correct copy of the original.

3. On about April 1991, RANGER wrote an appeal bond under California Code of Civil Procedure § 917.1 for the defendant ELIA NAJOR ("Debtor"). This bond was written in a case pending before the Superior Court for the County of San Diego, entitled *Ateeq v. Najor*, case number 599758. A true and correct copy of the bond written by RANGER is appended as Exhibit 1.

4. RANGER is a surety authorized to conduct business in the State of California. As part of its underwriting practices, RANGER ordinarily requires that collateral be deposited or otherwise made available to the surety in order to secure any loss RANGER might suffer.

5. In this case, several items of collateral were obtained. The first item was an irrevocable letter of credit drawn on an account at First Western Bank in the amount of $300,000. A true and correct copy of irrevocable letter of credit number 8 is appended as Exhibit 2.

6. In addition, a second deed of trust was presented by the Debtor, in the amount of $374,000, on

certain property owned by the Debtor located on Hesperia Road, in Victorville, California. A true and correct copy of the "Short Form Deed of Trust Assignment of Rents" dated April 12, 1991, which also acted as collateral, is appended hereto as Exhibit 3. This deed of trust was recorded in the San Bernardino County Recorder's Office, as document number 91-156644.

7. RANGER also required, concurrently with the submission of collateral, that the Debtor execute a collateral receipt agreement memorializing the conditions of deposit relative to, in particular, the real property security. A true and correct copy of the "Collateral Receipt and Agreement" is appended as Exhibit 4. That agreement states in pertinent part:

> The collateral security, together with income thereon, is pledged and deposited with Surety as security:
>
> (a) Against any and all liability, loss, costs, damages, expenses, premiums and attorney's fees arising or incurred in connection with the above captioned bond, or any other bond, recognizance, undertaking or other obligation (all of which, together with any continuations and modifications thereof, are hereinafter referred to as bonds), heretofore or hereafter executed, assumed or procured by Surety at the instance or request or on behalf either of Owner of the Principal above named;
>
> . . .

> **Upon receipt of evidence satisfactory to the Surety of its discharge from all liability under such bond(s), including, at the Surety's sole discretion potential claims which may arise during the applicable statute of limitations period, Surety shall, within a reasonable time, return said collateral security and/or the proceeds thereof**, less any deductions pursuant to the terms of this agreement, to Owner or his/her properly designated assignee or successor or interest. THIS RECEIPT MUST BE RETURNED UPON SURRENDER OF THE COLLATERAL SECURITY.
>
> [Bold added]

8. Thereafter, RANGER became aware of the order of January 5, 1993 issued by the United States Bankruptcy Court, Southern District of California in *In re Elia Najor*, case number 92-08844-Hll, which exonerated the appeal bond [Exhibit 1] written by RANGER *and* ordered return of the collateral. A true and correct copy of the order is appended as Exhibit 5. Thereafter, Debtor's counsel, Brian P. Ballo, requested return of the collateral. A true and correct copy of Mr. Ballo's January 13, 1993 letter is appended as Exhibit 6.

9. At this time, RANGER was unaware of any effort by GEORGE ATEEQ to appeal or attack the order.

10. Accordingly, RANGER thereafter returned the collateral in compliance with the court's order. This collateral was, in fact, returned. In addition, the security interest held by

RANGER to the real property that was secured as collateral was reconveyed on or about January 22, 1993. A true and correct copy of the full reconveyance, which was given to the Debtor's counsel, is appended as Exhibit 7. All collateral was returned in compliance with the court's order, and also given the lack of any attack or appeal by the debtor of a January 5, 1993 order.

11. Had RANGER been aware of any future attack by Mr. Ateeq, RANGER would not have acted as it did. But for the deposit of collateral in this case, RANGER would not have written the bond. Moreover, had RANGER known that Mr. Ateeq had intended to attack the aspect of the order exonerating the bond, RANGER would have sought to stay the aspect of the order requiring the return of collateral until the bond liability issues were *finally* resolved. Therefore, the issue of collateral and bond exoneration by the prior court order of January 5, 1993 are directly linked.

Executed this 7th day of November, 1995 in Houston, Texas.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ FRANCES V. TREVINO
Frances V. Trevino, Declarant

Supreme Court, U.S.
FILED
DEC 23 1998
OFFICE OF THE CLERK

No. 98-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE ATEEQ,
Petitioner,

vs.

ELIA NAJOR, RANGER INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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15 pp

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I. INTRODUCTION

By hyperbole and ignoring the merits of Petitioner George Ateeq's ("Ateeq") Petition for Writ of Certiorari, Respondent Ranger Insurance Company ("Ranger") in its Brief in Opposition[1] overlooks the question of whether a non-Article III bankruptcy judge can constitutionally hear and determine a "non-core, related to" proceeding to cancel a bond filed in a state court action pursuant to state law, without the express consent of the parties as required by the Federal Rules of Bankruptcy Procedure. In fact, Ranger does not once mention Bankruptcy Rules 7008 and 7012 which mandate that express consent be given before a bankruptcy judge can hear and determine a "non-core, related to" matter.

Instead, Ranger seeks to misdirect the focus of this Court by mischaracterizing and distorting Ateeq's arguments or raising irrelevant issues, never determined by the Ninth Circuit, such as whether "core" jurisdiction existed to cancel the bond.[2] Had the Ninth Circuit believed that core jurisdiction existed over the bond cancellation issue, it could have easily said so. However, recognizing that core jurisdiction did not exist over the issue of cancellation of the bond, the Ninth Circuit was forced to engage in its "non-core,

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[1] The Brief in Opposition is cited as "Opp. __." The Appendices to the Opposition are cited as "Opp. App. __." The Petition for Writ of Certiorari is cited as "Pet. __." The Appendices to the Petition are cited as "Pet. App. __."

[2] The fact that ATEEQ may not address each and every argument or contention asserted by RANGER in its Brief in Opposition should not be construed to mean that there is any merit to those arguments or contentions. Rather, ATEEQ has no desire to assist RANGER in diverting the Court's attention from the real question presented.

related to" analysis, which analysis neglects to address the express consent requirement.

Ranger makes three arguments why this petition should be denied. Only one of the arguments is even remotely relevant to the question presented, and none of the arguments supports denial of the petition. Granting Ateeq's petition will allow this Court the opportunity to address the express consent requirement and provide future guidance as to the constitutionality of "non-core, related to" jurisdiction. Accordingly, this Court should grant the Petition for Writ of Certiorari.

II. ARGUMENT

A. The Notice Of Motion And Motion For Turnover Do Not Give Notice That Ranger Would Be Released From Liability.

Ranger's first argument for denial of the petition is the erroneous contention that "Ateeq inaccurately claims that he had no prior notice that Najor sought bond exoneration." (Opp. 15.) Ranger even goes so far as to suggest that this Court's Rules compel denial of the petition because Ateeq has failed to "present with accuracy" his position. Yet it is Ranger that is misleading this Court. Ateeq has *never* argued that the request to *cancel the bond* was not noticed.

Debtor Elia Najor's ("Najor") Notice of Motion only states that he was seeking a "turnover of the collateral supporting the undertaking obtained by NAJOR ... and ... cancellation of the undertaking." (Opp. App. A-2.) Ranger's citation to the record reinforces Ateeq's contention that the release of liability was not noticed. While the Notice does discuss cancellation of the bond, it *does not* discuss a release

of all liability after cancellation of the bond.

By intentionally using the term "bond exoneration" instead of "bond cancellation," as actually ordered by the bankruptcy court, Ranger is ignoring the clear provisions of California law which expressly state that "cancellation" of a bond does not automatically result in a release of liability. Instead, the bond "remains in full force and effect" for certain liabilities incurred before, and for acts, omissions, or causes existing or which arose before, the cancellation. Moreover, legal proceedings may be had therefor in all respects "as though there had been no cancellation." (California Code of Civil Procedure ("CCP") § 996.360(a).) Thus, cancellation and release of liability are separate and distinct issues and it is clear in the record that there was no notice of a request for a release of Ranger's liability under the bond.[3]

B. The Cancellation Of The Bond And Release Of Liability Were Not Within The Bankruptcy Court's Core Jurisdiction.

Ranger's second argument for denial of the petition focuses on the purported "core" jurisdiction of the bankruptcy

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[3] Of course, Ranger also asserts that the bankruptcy court is not required to follow state law. (Opp. 18.) Such an argument is completely contrary to the most elementary notions of bankruptcy jurisprudence. *See, Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 918 (1979). (Property interests are created and defined by state law and should not be analyzed differently in a bankruptcy proceeding unless mandated by Congressional command or an identifiable federal interest.) While the bond was not property of the bankruptcy estate (*See Matter of Lockard*, 884 F.2d 1171, 1178 (9th Cir. 1989)), Ateeq had a property interest in the bond as its beneficiary (Opp. 7) and was entitled to application of state law in connection with the bond issues.

court to cancel the bond, an issue never addressed by the Ninth Circuit in its Memorandum. Ranger artificially attempts to conjure up core jurisdiction over cancellation of the bond and release of liability through two contentions. Neither is correct nor supports denial of the petition. First, Ranger argues that the turnover motion and bond cancellation are "inextricably linked." However, there was no such inextricable link. Nothing in the record supports Ranger's contention that the loss of its security mandated the cancellation of the bond. Ranger's frequent statements to the contrary do not make it true.

Second, Ranger argues that the bankruptcy court had core jurisdiction to cancel the bond because Ranger held collateral for the bond. Ranger can cite no case law nor offer any cogent analysis to support its argument that a motion involving collateral which is *not* property of the estate magically confers core jurisdiction on a bankruptcy court to cancel a bond filed in a state court action when the bond is already the subject of the jurisdiction of a state court.[4]

In arguing that the bankruptcy court had core jurisdiction under 28 U.S.C. § 157 to cancel the bond, Ranger completely ignores the literal requirements of § 157, which

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[4] Ranger cannot dispute Ateeq's showing that the bond was not property of the estate, that the proceeds of the letter of credit were not property of the estate and that Ranger lacked a valid and duly perfected deed of trust against real property of the estate. Moreover, the deed of trust itself was not property of the estate; it was the underlying real property which was property of the estate. Instead, Ranger can only argue that any *collateral* pledged as security for the *letter of credit* was property of the estate. However, Ranger cannot point to any such collateral. The schedules filed under penalty of perjury by Najor do not list any debt to First Western Bank, the bank issuing the letter of credit and do not disclose that First Western Bank had any interest in property of the estate.

must be read in conjunction with 28 U.S.C. § 1334. In fact, Ranger's only defense to Ateeq's showing that the cancellation of the bond did *not* arise under title 11 nor arise in a case under title 11, because cancellation of the bond was not based on any right expressly created by title 11 and procedures surrounding the bond have an existence outside of bankruptcy, is to claim this "begs the issue." (Opp. 16.). However, that is the test for determining whether core jurisdiction exists. *See, In re Eastport Associates,* 935 F.2d 1071, 1076 (9th Cir. 1991).

1. The Request For Cancellation Of The Bond And Release Of Liability Did Not Arise Under Title 11 Or Arise In A Case Under Title 11.

RANGER's primary argument for core jurisdiction is that it held collateral for the bond. However, the express language of section 157(b)(1) only authorizes bankruptcy judges to hear and determine "core proceedings arising under title 11 or arising in a case under title 11."

Najor's Notice of Motion and Motion for Turnover made two separate requests: (1) for turnover of collateral supporting the bond; and (2) for cancellation of the bond. All claims filed in bankruptcy court "must be able to stand on their own as either core or related proceedings." *In re Guild and Gallery Plus, Inc.*, 72 F.3d 1171, 1182 (3d Cir. 1996). Thus, the two separate requests must independently fall within the bankruptcy court's core jurisdiction.

The Ninth Circuit recognized this in its Memorandum (Pet. App. A1-A5) by holding:

> Because turnover is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E), we need

> *only address whether the bankruptcy court had jurisdiction to order cancellation of the appeal bond.* (Emphasis added.) (Pet. App.A2.)

Clearly, the mere fact that Najor filed a turnover motion is not sufficient to confer core jurisdiction over the separate cancellation issue. Under a separate analysis, it is clear the cancellation issue did not fall within the bankruptcy court's core jurisdiction.

The phrase "arising under title 11" describes only those proceedings that involve a cause of action "created or determined" by statutory provisions of title 11. *In re Leco Enterprises, Inc.*, 144 B.R. 244, 248 (S.D.N.Y. 1992). "Arising in" proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have *no* existence outside of the bankruptcy. *Eastport Associates*, 935 F.2d at 1076.

The cancellation of the bond does not invoke a substantive right provided by title 11. Nor is cancellation of the bond a proceeding that, by its nature, could arise *only* in the context of a bankruptcy case. The bond was created pursuant to state law, was filed in a state court action, was subject to the jurisdiction of the state court, and had an existence independent of the bankruptcy. But for Najor's bankruptcy case, any cancellation of the bond would have been heard in state court. A request for cancellation of a state court bond filed in a state court action is a traditional state court type of action which does not arise under title 11 or arise in a case under title 11. Accordingly, notwithstanding that the cancellation of the bond was sought at the same time as the turnover, the cancellation of the bond was not subject to the bankruptcy court's core jurisdiction.

Ranger seeks to overcome the clear showing that the

bond issues did not arise under title 11 or arise in a case under title 11 by asserting the so-called "inextricable link" between the turnover and bond cancellation. However, even if there were such a link, it would not be sufficient to confer core jurisdiction with the bankruptcy court. *See, In re Bennett*, 154 B.R. 126, 135 (Bankr. N.D.N.Y. 1992) (Non core proceedings do not become core solely by virtue of the fact that they purport to arise out of the same occurrence as core proceedings.) *See also, In re DeLorean Motor Co.*, 155 B.R. 521, 525 (9th Cir. BAP 1993). (A proceeding will *not* be considered core, even if it falls within the literal language of §157(b)(2)(A), if it is a state law claim that *could exist outside* of bankruptcy and is not inextricably bound to a right created by the Bankruptcy Code.) Clearly the bond had an existence outside of bankruptcy and was a creature of state law, dependent upon state law both for its existence and its termination. Core jurisdiction did not exist in this case over the bond cancellation issue.

C. Ateeq Did Not Expressly Consent To The Bankruptcy Court's Exercise Of Full Adjudicatory Jurisdiction.

Ranger's third argument for denial of the petition is that Ateeq expressly consented to the bankruptcy court's "non-core, related to" jurisdiction. Ranger makes two contentions in support of the bankruptcy court's exercise of "related to" jurisdiction. First, that this Court already held in *Celotex Corp. v. Edwards*, 514 U.S. 300, 115 S.Ct. 1493 (1995) that "Bankruptcy Court jurisdiction is 'at least' non-core." (Opp. 6.) Second, that Ateeq expressly consented to jurisdiction by approving the order canceling the bond "as to form." (Opp. 21.) Both contentions are flawed.

After arguing to the bankruptcy court and submitting a specific finding adopted by the bankruptcy court that the ruling in *Celotex* does *not* apply in this case (Pet. App. B5), Ranger now relies on *Celotex* for a finding of related to jurisdiction, calling it a "directly" and "strongly analogous case." However, in *Celotex*, there was a specific finding that over 141,000 asbestos-related bodily injury lawsuits were pending and over 100 such cases were in some stage of appeal with judgments totaling nearly $70 million being stayed by bonds. *Id.* at 1496 n. 2. If payments were made under the bonds resulting in the sureties enforcement of their rights to collateral, such actions would jeopardize and possibly destroy any chance of successful reorganization. *Id.* at 1497 n. 4. Here, there was no finding and can be no finding that payment by Ranger under the one bond to the one bonded creditor would have jeopardized reorganization or effected Najor's bankruptcy estate. Najor's schedules listed almost $28 million in assets against almost $9 million in liabilities. Additionally, the lower courts in *Celotex* took great care to protect the bonded judgment creditors. *Id.* at 1497 n. 4. Here, Ateeq's bond protection was completely destroyed. If anything, *Celotex* supports the proposition that the bankruptcy court could not do what it did in this case.

However, even if "non-core, related to" jurisdiction was present, Ateeq did not expressly consent to such jurisdiction as required to avoid constitutional infirmities.

Ranger contends that Ateeq expressly consented to jurisdiction by approving the order canceling the bond "as to form." (Opp. 21.) Approving the "form" of an order is an insufficient manifestation of express consent to the exercise of "non-core, related to" jurisdiction.

In *In re Daniels-Head & Associates*, 819 F.2d 914, 918 (9th Cir. 1987), the Ninth Circuit stated that "Congress

apparently modeled section 157(c)(2) after section 636" of the United States Magistrates Act. That Act allows parties to consent to a magistrate's jurisdiction to make final determinations in civil matters. (28 U.S.C. § 636(c).) In *Daniels-Head*, the Ninth Circuit concluded that because the Bankruptcy Code, on its face, did not require explicit consent to jurisdiction, as did the Magistrates Act, the failure to object to jurisdiction constitutes consent to jurisdiction. *Id.* at 919. However, the Bankruptcy Rules were amended in 1986 requiring express written consent to the exercise of non-core jurisdiction.

The Ninth Circuit recently addressed the express consent requirements of 28 U.S.C. § 636(c). In *In re Marriage of Nasca*, 160 F.3d 578 (9th Cir. 1998), the Ninth Circuit concluded that "consent may not be inferred from the conduct of the parties." *Id.* at 579. The Ninth Circuit recognized that unless there was a "clear and unambiguous expression of consent," the "grant of judicial power to magistrates would infringe on the constitutional rights guaranteed to litigants by Article III" of the Constitution. *Id.* Congress has recognized this constitutional difficulty in connection with bankruptcy jurisdiction by amending the Bankruptcy Rules to require express consent to the full exercise of "non-core, related to" jurisdiction by a non-Articles III bankruptcy judge.

This Court should likewise require that consent to a bankruptcy court's exercise of full adjudicatory jurisdiction in a "non-core, related to" matter be explicit, clear, unambiguous, and not inferred from the conduct of the parties. Thus, even if "approving an order as to form" could somehow be interpreted as an expression of consent to jurisdiction, which it is not, instead of merely an acknowledgment that the written order is in the proper form,

it falls well short of a "clear and unambiguous expression of consent" to the exercise of jurisdiction as required to avoid constitutional problems.

III. CONCLUSION

The Ninth Circuit ignored the requirement for express consent by all parties before a bankruptcy judge may constitutionally hear and determine a matter subject to its "non-core, related to" jurisdiction. In order to avoid infringing on the constitutional rights guaranteed to litigants by Article III of the Constitution, the consent required by 28 U.S.C. § 157(c)(2) must be explicit, clear, unambiguous and not inferred from the conduct of the parties.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: December 22, 1998

Respectfully submitted,

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